IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-388

TEX-LA ELECTRIC COOPERATIVE, INC., and
SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC.,
Petitioners,

v.

CECIL D. ANDRUS, Individually, and as Secretary of the Interior, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
Watergate 600 Building
Washington, D.C. 20037
(202) 337-0200

Attorneys for Petitioners

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Petitioners, Tex-La Electric Cooperative, Inc. ("Tex-La"), and Sam Rayburn Dam Electric Cooperative, Inc. ("Sam Rayburn"), respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on May 15, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is not officially reported, and is reproduced as Appendix A to this Petition (Appendices are bound separately for the Court's convenience). The opinion of the United States District Court for the District of Columbia Circuit, also unreported, is reproduced in Appendix C. The orders of the Federal Power Commission which were re-

viewed by the district court and the court of appeals are reported at 45 F.P.C. 183 (1971) and 45 F.P.C. 394 (1971), and are reproduced as Appendices D and E to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered May 15, 1978; the court's order denying rehearing was entered June 8, 1978. The jurisdiction of the Supreme Court is invoked under § 1254(1) of the Judicial Code, 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Flood Control Act of 1944 and the Administrative Procedure Act of 1946, as amended, are set forth in Appendix H to this Petition.

QUESTIONS PRESENTED

1. Whether recreation and fish and wildlife costs of a federal hydroelectric project may be recovered from power customers under authority of a federal statute which, by its terms, authorizes only the recovery of power costs.

2. Whether a rate order which violates one statutory standard and fails to evaluate others is "arbitrary, capricious, [and] an abuse of discretion" within the meaning of the Administrative Procedure Act.

3. Whether due process is denied when a ratepayer is precluded from challenging in *any* forum, administrative or judicial, the statutory factual basis on which the administrative power to set rates is conferred—particularly where the agency admits its failure to follow express statutory standards.

STATEMENT OF THE CASE

The Statutory Scheme

These cases involve non-statutory review of rate orders approved by the Federal Power Commission ("FPC") under authority of § 5 of the Flood Control Act of 1944, 58 Stat. 890, as amended, 16 U.S.C. § 825s. That statute authorizes the Secretary of the Interior ("Secretary") to sell power and energy at certain Corps of Engineers projects, at rates proposed by the Secretary and approved by the FPC. Such rates must conform to three statutory standards:

> (1) the rates must "encourage the most widespread use" of the power and energy subject thereto;
>
> (2) the rates must be "the lowest possible . . . consistent sound business principles";
>
> (3) the rates must "[have] regard to the recovery . . . of the cost of producing and transmitting such electric energy . . . within a reasonable period of years."

There is no provision in 16 U.S.C. § 825s for a hearing of any kind, or for notice and comment procedure.

Neither the FPC nor the Department of Interior has published the procedures by which it conducts its rate-making functions under 16 U.S.C. § 825s.

The above-described statutory scheme is implemented by contracts between customers and the various marketing agencies of the Department of the Interior.

The Disputed Rate Increases

Petitioners Tex-La and Sam Rayburn purchase power and energy under separate contracts[1] with the Southwestern Power Administration ("SPA"), a marketing agency of the Department of the Interior. Tex-La purchases the entire output of the Narrows Dam Project in Arkansas, and Sam Rayburn purchases the entire output of the Sam Rayburn Dam Project in Texas. Both projects are multiple purpose projects, constructed and operated by the Corps of Engineers.

The contracts provided for initial rates which were to remain in effect for five years. These initial rates were based on the estimated total costs of producing the power sold, including construction and operating costs allocable to the projects' power function, and on the so-called "repayment period" for each project—the period over which the original investment allocable to power was to be recovered.[2]

In 1970, following the appointment of a new Administrator of SPA, that agency submitted to the FPC

[1] The Tex-La/SPA contract was entered into on May 11, 1961, for a term of 25 years; the Sam Rayburn/SPA contract was entered into on February 13, 1964, for a term of 20 years.

[2] The Sam Rayburn contract provided for an initial rate of $950,004 per year, based on the estimated costs allocable to power and a repayment period of 50 years. The Tex-La contract provided for a rate of $367,992 per year, based on the estimated costs allocable to power and a repayment period of 96 years. The 96-year repayment period was proposed by SPA and approved by the FPC because the Narrows Dam Project had incurred a deficit of $753,671 prior to the time Tex-La contracted for the project's output. This deficit resulted from SPA's sales of the Narrows output to the Southwestern Electric Power Company ("SWEPCO") between 1951 and 1961.

proposed rate increases for the Narrows and Sam Rayburn projects. The alleged justification for these proposed rate increases was that the costs of producing power at the two projects had increased.

The only "facts" filed by SPA in support of the proposed rate increases were the alleged cost figures shown in the "repayment studies"[3] prepared by SPA for the Narrows and Sam Rayburn projects. (The relevant parts of these studies are reproduced in Appendices F and G of this Petition.) These repayment studies, unlike the cost of service studies required by the FPC for all ratemaking under the Federal Power Act and the Natural Gas Act, simply show summary costs for each year of the repayment period, broken down into four very broad categories: (1) investment, (2) Corps of Engineers operating expense, (3) SPA operating expense, and (4) interest. These is no explanation in the repayment studies or elsewhere in the record of what specific expenditures, actual or anticipated, constitute these alleged investments, operating expenses and interest expenses, or why such expenditures are properly allocable to power rather than to some other project purpose.

Petitioners attempted to challenge the factual basis of the proposed rates at the agency level but were denied any meaningful opportunity to do so. Because the FPC has no regulations for ratemaking under 16 U.S.C. § 825s, Petitioners could not engage in any kind

[3] Repayment studies were developed for use in financial reporting, not for ratemaking purposes; even as used for reporting, they have recently come under heavy criticism by the General Accounting Office. Samuelson, "Average Rate and Repayment Studies for Federal Power Systems—A Reporting Enigma," GAO Review 40 (Fall 1975).

of discovery with respect to the costs alleged in the repayment studies.[4] Therefore, although they had no statutory right to a hearing, Petitioners requested the FPC to convene hearings as an exercise of discretion, in order to determine whether the summary costs alleged in the repayment studies were in fact the costs of producing power at the two projects. J.A. 172, 935.[5]

When their requests were denied, Petitioners filed written comments on the proposed rates. Sam Rayburn questioned (1) the alleged investment costs, (2) the alleged Corps operating costs, (3) the alleged SPA operating costs, (4) the inclusion of future replacement costs in the proposed rate, (5) inconsistencies between the cost figures used in the repayment studies and the cost figures shown in other SPA documents for the Sam Rayburn project, and (6) the substantial disparity between the proposed rate to Sam Rayburn and the rates charged to other SPA customers. In addition, Sam Rayburn submitted an alternative set of figures to the FPC which demonstrated that no rate increase was necessary. J.A. 1002-07; 1020-26. Tex-La questioned (1) alleged investment costs, (2) alleged Corps operating costs, (3) the effect of remote control operations on operating costs, and (4) the inclusion in the proposed rate of a $753,671 deficit which SPA had

[4] By way of contrast, it may be noted that the FPC's regulations for ratemaking under the Federal Power Act and the Natural Gas Act provide for subpoenas and data requests, 18 C.F.R. § 1.23, and depositions, 18 C.F.R. § 1.24.

[5] Citations to the joint appendix filed in the Court of Appeals are designated "J.A." Citations to Appendix 2 to Defendants' Memorandum in Support of Their Cross-Motion for Summary Judgment are designated "Def. App. 2." Citations to the transcript of the oral argument in the Court of Appeals are designated "Tr. Or. Arg."

incurred as a result of sales of Narrows Dam power to the Southwestern Electric Power Company during the period 1951-1961, before SPA entered into the present contract with Tex-La.[6] J.A. 170-72.

After receiving Petitioners' comments, the FPC twice sent inquiries to the Corps of Engineers concerning the costs alleged by SPA because some 93 percent of these costs were supposedly incurred by the Corps; the Corps never responded. J.A. 949, 1008, 1059. Moreover, SPA subsequently admitted that it usually does not verify the Corps of Engineers costs, including investment costs, shown in repayment studies. Def. App. 2 at 365-66.

In orders[7] issued January 22, 1971, and March 5, 1971, the FPC approved the rate increases for Narrows Dam and Sam Rayburn Dam, respectively.[8] The Commission's orders contained no mention or evaluation of either the "lowest possible rates . . . consistent with sound business principles" standard or the "most widespread use" standard. And, though the orders paid lip-service to the "recovery of cost standard," they did not respond to a single one of the comments listed above.

Having been denied a hearing and meaningful notice and comment procedure at the agency level, Petitioners sought to try the disputed facts on which the rate increases were premised in the district court in suits to

[6] Inclusion of the $753,671 deficit prior to the end of the repayment period was contrary to express representations made by the SPA Administrator to Tex-La during the negotiations of the SPA/Tex-La contract. Affidavit of Douglas G. Wright, Administrator of SPA 1943-69, Def. App. 2 at 834.

[7] The FPC approved rates of $465,000 per year for Narrows Dam and $1,030,000 per year for Sam Rayburn Dam.

enjoin enforcement of the rate increases. These suits for declaratory and injunctive relief were filed in 1971 and later consolidated.

Petitioners commenced discovery in the district court with two extensive sets of interrogatories. Incredibly, the Respondent members of SPA and the FPC, the agencies having statutory responsibility for proposing and approving rates under 16 U.S.C. § 825s, could not answer many of the interrogatories concerning the alleged costs; these interrogatories were forwarded to, and answered by, the Corps of Engineers, an agency having no ratemaking authority under 16 U.S.C. § 825s. The Corps' answers, which were adopted by Respondents, admit that the disputed Narrows Dam rate would recover recreation and fish and wildlife costs. (see *infra* at 13).

Repeated efforts by the Respondents to have the suits dismissed on procedural grounds consumed approximately three years.[8] Petitioners then proceeded to move for summary judgment on the grounds that the procedures used by the FPC to approve SPA's rate proposals violated §§ 552(a)(1) and 706(2)(A) of the Administrative Procedure Act and denied Petitioners due process of law. The relevant facts on which Petitioners' motion was based were (1) the content of the orders in question, which failed to evaluate two of the three standards of 16 U.S.C. § 825s, (2) the content of the agency record, which contained no facts other than the SPA repayment studies to

[8] The motion of members of the FPC to be dropped as parties defendant was filed August 13, 1971, and denied June 20, 1972; the defendants' motion to dismiss the complaint was filed September 15, 1971, and denied June 20, 1972; defendants' motion for judgment on the pleadings was filed April 2, 1973, and denied May 6, 1974.

support an ultimate finding that the third standard of 16 U.S.C. § 825s was satisfied, and (3) the undisputed fact that neither the Secretary nor SPA had published the procedures by which rates are proposed under 16 U.S.C. § 825s, and the FPC had not published the procedures by which it approves such rates.[9] The disputed costs on which the rate increases were based were not relevant to Petitioners' motion for summary judgment, except to the extent that they emphasized the procedural deficiencies complained of.

Shortly after Petitioners filed their motion for summary judgment, SPA prepared new repayment studies for the Narrows and Sam Rayburn projects. These studies purported to show that actual costs between 1970 and 1975 exceeded the estimated costs shown in the repayment studies which had been used to justify the 1971 rate increases. As with the earlier studies, however, there was no explanation of how the alleged costs, either "actual" or "estimated," were determined. There was no indication of what specific expenditures, either historic or anticipated, were associated with the alleged costs, and there was no explanation of why such expenditures are properly allocable to power. In other words, all of the deficiencies in the repayment studies which gave rise to this suit were repeated in the later studies.

[9] Failure to publish the procedures by which rates for federal hydropower are proposed and approved under the reclamation laws has been held to be in violation of § 552(a)(1) of the Administrative Procedure Act. Northern California Power Agency v. Morton, et al., 396 F.Supp. 1187 (D.D.C. 1975), aff'd mem. sub nom., Northern California Power Agency v. Kleppe, et al., 439 F.2d 243 (D.C. Cir. 1976).

After preparing the new repayment studies, Respondents filed a cross-motion for summary judgment in which they argued that the alleged costs on which the disputed rates were based were in fact too low. As "evidence" that these alleged costs were too low, Respondents submitted the results of *new* repayment studies, supported by new affidavits. These affidavits, which simply testified as to the accuracy of the repayment studies, were prepared specifically for the district court litigation approximately five years after the rate filings in question were prepared.

In opposition to Respondents' cross-motion for summary judgment, Petitioners maintained that the alleged costs on which the rate increases were based were material facts as to which a genuine dispute existed. Petitioners submitted the affidavit of an experienced expert power witness who testified that neither the repayment studies nor Respondents' new litigation affidavits "provided engineering, economic and cost of service data to justify the increases of revenue to be collected from Tex-La and Sam Rayburn." J.A. 454. Petitioners' expert witness effectively illustrated the inadequacy of the repayment studies relied on by Respondents to justify rates with the following example:

> "As a simple example, the rate and repayment study for Sam Rayburn Dam estimates that a 'replacement' facility costing $401,600 will be installed in the year 2002. In order to determine the validity of that forecast, SPA must reveal *what* the facility is, *why* it must be installed, and *why* it will cost $401,600 in the year 2002. That information has not been provided by SPA." J.A. 455.

In an order dated March 31, 1977, the district court granted summary judgment in favor of Respondents.

The district court's judgment was affirmed by the United States Court of Appeals for the District of Columbia Circuit in an order of May 15, 1978.

REASONS FOR ALLOWANCE OF THE WRIT

Title 16 U.S.C. § 825s controls the marketing of hydroelectric power and energy at 75 federal projects located in 15 states.[10] These projects have an aggregate capacity of some 18.4 million kilowatts.[11]

Although SPA has marketed power under authority of 16 U.S.C. § 825s since 1944, the ratemaking standards of that statute and similar statutes[12] have never before been tested in this Court. Nor has the scope of review for ratemaking under such statutes ever been judicially defined. The present suit thus presents to the Court a case of first impression.

The need for review of this case is further underscored by the fact that SPA has already begun to use the Court of Appeals decision as precedent in a major rate case involving 59 customers and 21 projects. *See* U.S. Department of the Interior, Southwestern Power Administration, Transcript of Proceedings held July 20, 1978, in the matter of Public Information Forum, at 138-39. Thus, the Court of Appeals' decision, if allowed to stand, will have a major impact on the marketing of federal hydroelectric power.

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[10] *See* Bonneville Power Administration, 1976 Annual Report 21 (1977); Southeastern Power Administration, 1976 Annual Report 3 (1977); Southwestern Power Administration, 1976 Annual Report 20 (1977).

[11] *Id.*

[12] *E.g.*, Bonneville Project Act, 16 U.S.C. § 838g; Columbia River Transmission System Act, § 9, 16 U.S.C. § 838g; Fort Peck Project Act, 16 U.S.C. § 833d; Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831h-1.

I. THE COURT OF APPEALS ERRED IN AFFIRMING A RATE ORDER WHICH RESPONDENTS HAVE ADMITTED RECOVERS RECREATION COSTS AND FISH AND WILDLIFE COSTS IN VIOLATION OF THE COST RECOVERY STANDARD OF 16 U.S.C. § 825s.

Agency action which is not in accord with the agency's enabling legislation is invalid. *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 488-89 (1942); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 294 U.S. 449, 504-05 (1935); *Florida* v. *United States*, 282 U.S. 194, 211-15 (1931). Thus, agency ratemaking must comply with the standards prescribed by Congress in the statute authorizing the ratemaking. As this Court said in the first *Morgan* case, which involved ratemaking by the Secretary of Agriculture under the Packers and Stockyards Act, 7 U.S.C. §§ 181 *et seq.*:

> "The Secretary, as the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed." *Morgan* v. *United States*, 298 U.S. 468, 479 (1936).

Similarly, the Secretary of the Interior and the FPC, in making rates under authority of 16 U.S.C. § 825s, must "make them in accordance with the standards and under the limitations which Congress has prescribed." Those "standards and limitations" are that the rates shall (1) "encourage the most widespread use" of the power and energy subject thereto, (2) be "the lowest possible rates to consumers consistent with sound business principles," and (3) have "regard to the recovery . . . of the cost of producing and transmitting such electric energy." The only standard which is evaluated in the orders and in the record is

the "recovery of cost" standard, and Respondents have admitted that they did not adhere to that standard in approving the disputed rate increase for Narrows Dam.

By its express terms, 16 U.S.C. § 825s limits recoverable costs to "the cost of producing and transmitting such electric energy." This limitation is consistent with the concomitant standard of 16 U.S.C. § 825s which requires that rates be "the lowest possible rates to consumers consistent with sound business principles."

Yet Respondents have admitted that the disputed Narrows Dam rate would recover costs other than the cost of producing and transmitting electric energy. In their second set of interrogatories Petitioners asked:

> "What percentage of the operating and maintenance costs assigned to power is actually used for recreation and fish and wildlife at the Narrows Dam project?"

Neither SPA nor the FPC could answer this question, so it was forwarded to the Corps of Engineers. The Corps answered:

> "On a cumulative basis from FY 65 to FY 73, 4.49% of Operating and Maintenance costs assigned to Power was actually used for Recreation and Fish and Wildlife on the Narrows Dam Project."

The "Operating and Maintenance costs assigned to power" referred to in the Corps' answer are the costs shown in column 4 of the repayment study for Narrows Dam (Appendix G, *infra*). These costs would be recovered from Petitioner Tex-La under the rate order affirmed by the Court of Appeals.

Presumably, if Congress had intended that power customers pay non-power costs, notwithstanding the plain language of the "recovery of cost" standard and the "lowest possible rates . . . consistent with sound business principles" standard, Congress would have provided expressly therefor.[13] The uniform policy of Congress has been to make recreation costs and fish and wildlife costs non-reimbursible. *See, e.g.,* Canadian River Reclamation Project, § 2, 43 U.S.C. § 600d; Arbuckle Project Act, § 2, 43 U.S.C. § 616*l*; Mann Creek Project Act, § 3, 43 U.S.C. § 616i; Fryingpan-Arkansas Project Act, § 4, 43 U.S.C. § 616c; Southern Navigation Project, § 2, 43 U.S.C. § 616hhh.

But neither 16 U.S.C. § 825s nor any other provision in the Flood Control Act of 1944 authorizes the recovery of non-power costs from power customers. Section 4, which is codified at 16 U.S.C. § 460d, provides for the construction, maintenance, and operation of recreation and fish and wildlife facilities. Section 4 also provides that "all moneys recovered by the United States for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts." However, section 4 does not authorize recovery of the costs of maintaining recreation and fish and wildlife facilities from power customers.

Nor is there any provision in the general legislation dealing with recreation and fish and wildlife which would authorize recovery of recreation costs or fish and

[13] With respect to the Bonneville Project Act and the Reclamation Project Act of 1939, both of which contain recovery of cost standards similar to that of 16 U.S.C. § 825s, Congress has provided expressly for the use of power revenues to pay irrigation costs.

wildlife costs by rates set under authority of 16 U.S.C. § 825s.[14]

The FPC exceeded its statutory authority in approving a rate which would recover recreation and fish and wildlife costs, in violation of the cost recovery standard prescribed by Congress in 16 U.S.C. § 825s. The FPC's order approving the rate was therefore "arbitrary, capricious [and] an abuse of discretion" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and should have been declared unlawful and set aside accordingly.

II. THE COURT OF APPEALS ERRED IN AFFIRMING RATE ORDERS WITHOUT REQUIRING AN EVALUATION OF EITHER THE "MOST WIDESPREAD USE" STANDARD OR THE "LOWEST POSSIBLE RATES . . . CONSISTENT WITH SOUND BUSINESS PRINCIPLES" STANDARD OF 16 U.S.C. § 825s

An agency's order may be affirmed only on the grounds articulated by the agency in the order itself. *FPC* v. *Texaco,* 417 U.S. 380, 398 (1974); *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168-69 (1962); *SEC* v. *Chenery Corp.,* 332 U.S. 194, 196 (1947).

The FPC orders approving the disputed rate increases for the Narrows and Sam Rayburn projects are reproduced as Appendices D and E of this Petition. Examination of these orders reveals that there is no evaluation of either the "most widespread use" standard or the "lowest possible rates . . . consistent with sound business principles" standard. Nor is there any evaluation of these standards in the underlying record;

[14] *E.g.,* Federal Water Project Recreation Act, 16 U.S.C. § 460 l-12, *et seq.*; Land and Water Conservation Fund Act of 1965, 16 U.S.C. § 460l-4, *et seq.*; Water Resources Development Act of 1974, Pub. L. No. 93-251, 88 Stat. 12.

the repayment studies, which constitute the entire factual basis upon which the FPC approved the rate increases, concern only the "recovery of cost" standard, which Respondents admit they did not follow.

The FPC has repeatedly acknowledged that both the "most widespread use" standard and the "lowest possible rates . . . consistent with sound business principles" standard apply to ratemaking under 16 U.S.C. § 825s. *E.g., U.S. Dept. of the Interior, Bonneville Power Administration,* 53 F.P.C. ——, 40 Fed. Reg. 40205 (1975); *U.S. Dept. of the Interior, Southeastern Power Administration* 53 F.P.C. ——, 40 Fed. Reg. 29127 (1975); *U.S. Department of the Interior, Bonneville Power Administration,* 34 F.P.C. 1462, 1465 (1965).

This Court has held that agency orders which do not contain an evaluation of all relevant standards are invalid. In *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83 (1957), the Court set aside an order issued by the Interstate Commerce Commission under authority of the Motor Carrier Act of 1935, as amended by the Transportation Act of 1940 and the National Transportation Policy, 49 U.S.C. §§ 1 *et seq.* The order gave effect to the "public convenience and necessity" standard of the Motor Carrier Act. *See A. W. Schaffer Extention-Granite,* 63 M.C.C. 247, 257-58 (1955). This Court nevertheless held the order invalid because it failed to evaluate the "inherent advantages" standard of the National Transportation Policy:

> "[W]e find at the outset that there has been no evaluation made of the 'inherent advantages' of the motor service proposed by the applicant. [The National Transportation Policy] requires the Commission to administer the Act so as to 'recognize and preserve the inherent advantages' of each mode of transportation. . . .
>
> "Since the Commission has failed to evaluate the benefits [*i.e.,* the "inherent advantages"] that Schaffer's proposed service would provide the public, including whatever benefit may be determined to exist from the standpoint of rates, and since the findings as to the adequacy of rail service do not provide this Court with a basis for determining whether the Commission's decision comports with the National Transportation Policy, that decision must be set aside, and the Commission must proceed further in light of what we have said." 355 U.S. at 89, 92.

The Court applied the same reasoning in a rulemaking context in *FPC* v. *Texaco,* 417 U.S. 380 (1974). There, the Court held invalid an FPC rule issued under authority of the National Gas Act, 15 U.S.C. §§ 717 *et seq.,* because the rule did not show compliance with the "just and reasonable" standard of the National Gas Act:

> "[The order] falls short of that standard of clarity that administrative orders must exhibit. The Commission was bound to exercise its discretion within the limits of the standards expressed by the Act; and 'for the courts to determine whether the agency *has* done so, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it."' " 417 U.S. at 395-96.

The requirement that agency orders and rules evaluate relevant standards is not limited to cases where the enabling legislation requires formal findings of fact. *See Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 408-09, 419-20 (1971).

In the case now before this Court, the orders in question fail to show that Respondents exercised their discretion within the limits prescribed by Congress in the "most widespread use" standard and the "lowest possible rates . . . consistent with sound business principles" standard. Nowhere in the orders or in the underlying agency record is either of these standards mentioned or evaluated. The orders should therefore be declared unlawful and set aside as required by the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

III. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS WERE NOT ENTITLED TO TRY THE DISPUTED COSTS IN ANY FORUM

Petitioners had no meaningful opportunity to challenge the disputed costs at the agency level, by trial or otherwise. The FPC did not publish the procedures used to approve the rates, so there was no "reasonably complete code of procedures set out in advance by which actions can be guided and strategies planned." *Northern California Power Agency* v. *Morton et al.*, 396 F. Supp. 1187, 1191 (D.D.C. 1975), *aff'd mem. sub nom., Northern California Power Agency* v. *Kleppe, et al.* 539, F.2d 243 (D.C. Cir. 1976). Petitioners were denied a hearing on the disputed costs, and their opportunity to submit written comments was rendered meaningless by the agency's failure to respond to the significant points raised. *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977), *cert. denied*, —— U.S. ——, 54 L.Ed.2d 89 (1977); *Rodway* v. *Department of Agriculture*, 517 F.2d 804, 817 (D.C. Cir. 1975); *Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973). In effect, Petitioners were presented with the rate increases on a "take it or leave it" basis.

The particular need for a trial of the costs disputed in the present case is illustrated by the following comment of Judge Wilkey, made during oral argument:

> "Well, take this item which is referred to in oral argument of [Petitioners'] Counsel, in Column 17 . . . .
>
> "Here's an item of $401,600 projected for expense in—I guess investment—yes, investment, in the year 2002, and it's supposed to be for power purposes. That's why in that column. . . .
>
> "Well, I'd like to be told here whether this is a fishing lodge-motel, or its the bearings and bushings that go into the generator, that need to be replaced there. If I were told that simple fact one way or another, I might have an idea as to whether this is a proper expense for power investment.
>
> "And I suppose that's what the Petitioners were asking for." Tr. Or. Arg. 33-35.

The Court of Appeals held that Petitioners were not entitled to a trial of the disputed costs on which the rates were premised, either at the agency level or in the district court. This holding conflicts with the intent of Congress as evidenced by the legislative history of the Administrative Procedure Act, and is violative of fundamental notions of due process.

Section 553(c) of the Administrative Procedure Act provides that the hearing requirements of §§ 556 and 557 shall apply "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing." There is no such requirement in 16 U.S.C. § 825s.

However, in enacting § 553(c), Congress intended that, in cases where the statute does not provide for the rule to be made "on the record after opportunity for

an agency hearing," disputed facts relevant to the validity of the rule would be tried in the district court. Thus, § 706 of the Administrative Procedure Act provides that "the reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

The Senate and House Reports and statements by the Administrative Procedure Act draftsmen show Congress intended that facts relevant to the validity of an agency rule would be tried in the district court in cases where the agency is not given the trial of fact function. For example, the Senate Report states:

> "[Section 706(2)(F)] would also require the judicial determination of facts in connection with rule making or any other conceivable form of agency action to the extent that the facts were relevant to any pertinent issues of law presented. . . . Where a court enforces or applies an administrative rule, the party to whom it is applied may offer evidence and show the facts upon which he bases a contention that he is not subject to the terms of the rule. Where for example an affected party claims in a judicial proceeding that a rule issued without an administrative hearing (and not required to be issued after such hearing) is invalid, he may show the facts upon which he predicates such invalidity." S. Rep. No. 752, 79th Cong., 1st Sess. 28 (1945).

The House Report added the following language:

> "In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant question of law must be tried and determined de novo by the reviewing court respecting either the validity or application of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 45-46 (1946).

Professor McFarland, one of the drafters of the Administrative Procedure Act and former chairman of the Administrative Law Section of the American Bar Association, has explained the allocation of the trial of fact function under the APA as follows:

> "But where the administrative agency is not given the trial function, where are the facts to be tried out and record made? In the courts, of course, because where there are relevant fact issues they must be established somewhere. The assumption is that, unless Congress allocates the trial-of-fact function to an administrative agency by providing for agency hearings (or the same result is reached by constitutional implication), then the trial function falls to the courts under their general jurisdiction. The APA recognizes the situation by (a) providing for judicial review on the administrative record 'of an agency hearing provided by statute' or (b) otherwise requiring a determination whether the challenged administrative action is 'unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.' 5 USC 706(2)(E) and (F). But to what 'extent' are facts subject to court determination de novo? They must be relevant to the legal issue posed under the organic legislation involved, of course. . . . Presumably they must also be of such a nature that they would foreclose the administrative exercise of discretion because, if the facts establish that the agency could and did rule as it did within

its authority, it would not lie with the reviewing court to deny the agency the discretion given it under the organic legislation." C. McFarland, CASES AND MATERIALS ON ADMINISTRATIVE LAW 421 (1975).

Similarly, Professor Nathanson writes:

> "[A]n underlying assumption of the APA draftsmen was that any factual issues which became pertinent in a challenge to the validity of a section 553 rule would be resolved in the first instance in judicial proceedings—either in enforcement proceedings or in suits to enjoin enforcement...
>
> "This is also consistent with the judicial review provisions of the APA. Section 706(2)(F) provides: 'the reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.'" Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review under the Administrative Procedure Act and Other Federal Statute,* 75 Col. L. Rev. 721, 755 (1975) (hereinafter "Nathanson").

And Professor Davis, in the second (1978) edition of his treatise, states:

> "A requirement of [f]actual support for rules is quite different from a requirement of findings...
>
> "In 1946 the assumption was that the factual ingredient of rulemaking could be fought out in a reviewing court, and that the court would make a de novo determination of the facts [citing the legislative history of the Administrative Procedure Act]." 1 K. Davis, ADMINISTRATIVE LAW TREATISE 506-07 (2d ed. 1978).

The requirement that disputed facts be tried in *some* forum, albeit not necessarily at the agency level, is rooted in due process. *See Southern Railway Co.* v. *Virginia,* 290 U.S. 190 (1933). Thus, Professor Nathanson writes:

> "It must be equally apparent that Congress may not insulate an administrative regulation from such a challenge [i.e., a trial of disputed facts] any more than it could its own legislation. Consequently, a fair opportunity to develop in some forum—either administrative or judicial—the underlying facts essential to the resolution of the controversy may not be foreclosed. For this purpose, it is quite immaterial whether the challenge to the regulation is formulated in constitutional terms or simply as a failure to comply with statutory standards; in either case, the due process right to challenge fairly the validity of a regulation . . . is compelling." Nathanson at 757.

The due process derivation of the right to try disputed facts of course assumes the existence of an interest which (1) is entitled to due process protection and (2) would be adversely affected by the agency action. Petitioners have such an interest at stake in this proceeding. Petitioners have both a statutory right and a contractual right to rates which conform to the standards of 16 U.S.C. § 825s. These rights are entitled to due process protection. *See Lynch* v. *United States,* 292 U.S. 571, 579 (1939); *United States* v. *Northern Pacific Railway Co.,* 256 U.S. 51, 64, 67 (1921); *United States* v. *Central Pacific Railroad Co.,* 118 U.S. 235, 238 (1886).

The requirement of a trial de novo to resolve disputed facts which were not tried at the agency level and which are relevant to the validity of agency action

also finds support in the case law. In *Jordan* v. *American Eagle Fire Insurance Co.,* 169 F.2d 281 (D.C. Cir. 1948), a case decided shortly after the enactment of the Administrative Procedure Act, Judge Prettyman wrote:

> "It is also established that where the requisite due process hearing is not included in the legislative or administrative process, it may be adequately supplied by a judicial proceeding in which new evidence may be supplied and full opportunity afforded for exploration of the bases of the disputed order. . . . Porter v. Investors Syndicate, 1932, 286 U.S. 461, 52 S.Ct. 617, 76 L.Ed. 1226; Wadley So. Ry. Co. v. Georgia, 1915, 235 U.S. 651, 661, 35 S.Ct. 214, 59 L.Ed. 405, 411, and cases cited. See Mr. Justice Brandeis, dissenting in Ohio Valley Water Co. v. Ben Avon Borough 1920, 253 U.S. 287, 292, 40 S.Ct. 527, 64 L.Ed. 908, 915; and Mr. Chief Justice Hughes, Mr. Justice Stone and Mr. Justice Cardozo, dissenting in Southern Ry. Co. v. Virginia, 1933, 290 U.S. 190, 199, 54 S.Ct. 148, 78 L.Ed. 260. See also reference in Ohio Bell Tel. Co. v. Public Utilities Commission, 1937, 301 U.S. 292, 303, 57 S.Ct. 724, 81 L.Ed. 1093." *Id.* at 289.

Two more recent decisions by this Court appear to require a different result, however. In *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 415 (1971), the Court held that trial de novo was inappropriate to review a decision of the Secretary of Transportation under § 4(f) of the Transportation Act of 1966, as amended, 49 U.S.C. § 1653(f), and § 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138, authorizing the use of federal funds to construct a highway. And in *Camp* v. *Pitts,* 411 U.S. 138, 141-42 (1973), the Court held that trial de novo was inappropriate to review a decision of the Comptroller of the

Currency under the National Bank Act, 12 U.S.C. § 27, not to issue a certificate authorizing construction of a new bank. In *Overton Park,* the Court said:

> "De novo review of whether the Secretary's decision was 'unwarranted by the facts' is authorized by § 706(2)(F) in only two circumstances. First, such de novo review is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." 401 U.S. 415.

Curiously, the only authority cited in support of the above-quoted statement in *Overton Park* was H.R. Rep. No. 1980, 401 U.S. 415, and the only authority cited in *Camp* was *Overton Park,* 411 U.S. 141.

Yet a careful reading of H.R. Rep. No. 1980 indicates that Congress intended a trial de novo in situations other than those specified in *Overton Park.* For example, H.R. Rep. No. 1980 provides:

> "The sixth category [*i.e.,* 5 U.S.C. § 706(2)(F)], respecting the establishment of facts upon trial de novo, would require the reviewing court to determine the facts in *any* case of adjudication not subject to sections 7 and 8 or otherwise required to be reviewed exclusively on the record of a statutory agency hearing." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 45 (1946). (Emphasis added.)

The House Report continues:

> "It would also require the judicial determination of facts in connection with *rule making or any other conceivable form of agency action to* the extent that the facts were relevant to *any* pertinent issues of law presented." *Id.* (Emphasis added.)

There is no limitation in the above statement to enforcement proceedings. The reference to enforcement procedings appears in the next sentence:

> "*For example,* statutes providing for 'reparation orders,' in which agencies determine damages and award money judgments, usually state that the money orders issued are merely prima facie evidence in the courts and the parties subject to them are permitted to introduce evidence in the court in which the enforcement action is pending." *Id.* (Emphasis added.)

Thus, the reference to enforcement proceedings is expressly by way of example only. And in the very next sentence, the House Report says:

> "*In other cases,* the test is whether there has been a statutory administrative hearing of the facts which is adequate and exclusive for purposes of review." *Id.* (Emphasis added.)

Again, there is no limitation to enforcement proceedings. The House Report next gives three examples of "other cases" in which trial de novo would be appropriate:

> "[1] Thus, adjudications such as tax assessments not made upon a statutory administrative hearing and record may involve a trial of the facts in the Tax Court or the United States district courts. [2] Where administrative agencies deny parties money to which they are entitled by statute or rule, the claimants may sue as for any other claim and in so doing try out the facts in the Court of Claims or United States district courts as the case may be. [3] Where a court *enforces or applies* an administrative rule, the party to whom it is applied may for example offer evidence and show the facts upon which he bases a contention

> that he is not subject to the terms of the rule." (Emphasis added.)

Here, the reference is not to enforcement proceedings but to cases where a court "enforces or applies" a rule. A court may enforce or apply a rule in suits for declaratory and injunctive relief, such as in the present case. Thus, the phrase "enforces or applies" does not limit the example to enforcement proceedings.

The House Report next gives an example of a case where a court "enforces or applies" a rule, which further indicates that such cases are not limited to enforcement proceedings:

> "Where for example an affected party claims in a judicial proceeding that a rule issued without an administrative hearing (and not required to be issued after such hearing) is invalid for some relevant reason of law, he may show the facts upon which he predicates such invalidity." *Id.*

Here, the reference is to "judicial proceedings," not "enforcement proceedings." Moreover, the term "affected party" would include a plaintiff in a suit to enjoin enforcement of an agency rule. *See* Administrative Procedure Act, 5 U.S.C. § 702; S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 42 (1946).

Finally, after the above-quoted examples, the House Report summarizes the cases in which trial de novo is appropriate:

> "In short, where a rule or order is not required by statute to be made after opportunity for agency hearing and to be reviewed solely upon the record thereof, the facts pertinent to any relevant ques-

> tion of law must be tried and determined de novo by the reviewing court *respecting either the validity or application* of such rule or order—because facts necessary to the determination of any relevant question of law must be determined of record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in court." H.R. Rep. No. 1980, 79th Cong., 1st Sess. 45-46 (1946). (Emphasis added.)

Unlike the previously mentioned examples of cases where trial de novo is appropriate, which are illustrative only, the above-quoted statement articulates the general rule of law with respect to trial de novo; it thus embraces all of the examples expressly mentioned in the House Report, and other examples not mentioned. This statement contains no limitation, express or implied, to enforcement proceedings. To the contrary, the phrase "either the validity or application of such rule" indicates the applicability of 5 U.S.C. § 706(2)(F) to injunctive and declaratory proceedings. This conclusion finds support in the House Report's analysis of § 703 of the Administrative Procedure Act, which provides for the forum and venue of judicial review proceedings. The House Report states:

> "Declaratory judgment procedure, for example, may be operative before statutory forms of review are available *and may be utilized to determine the validity or applications of any agency action." Id.* at 42. (Emphasis added.)

Thus, declaratory judgment procedure can be used to determine "the validity or application of any agency action." And, where a rule is not required by statute to be made on the record after opportunity for an agency hearing, "the facts pertinent to any relevant question

of law must be tried and determined de novo by the reviewing court respecting either the validity or application of such rule." It necessarily follows that trial de novo of facts pertinent to the validity of a rule is not limited to enforcement proceedings, but is appropriate in suits for declaratory and injunctive relief. Thus, Professor Nathanson has stated that trial de novo of facts pertinent to the validity of an agency rule would be tried de novo "either in enforcement proceedings or in suits to enjoin enforcement." Nathanson at 755.

Indeed, there appears to be little logical basis for distinguishing between enforcement proceedings and suits to enjoin enforcement. If Petitioners had not brought suits to enjoin the enforcement of the 1971 rate orders, and had simply withheld payment, Respondents would no doubt have initiated enforcement proceedings to compel payment. Why is a trial of the disputed facts appropriate in the latter case, but not the former?

Both *Overton Park* and *Camp* may be distinguished from the present case on technical grounds. Neither case involved the scope of review for informal rulemaking proceedings, as does the present case. And in *Overton Park* and *Camp* the critical procedural deficiency was the lack of adequate reasons to support the agency action; in neither opinion did the Court note the existence of specific issues of adjudicatory fact which the plaintiffs claimed were pertinent to the validity of the agency action in question. However, to the extent that the Court feels constrained to apply its holdings in *Overton Park* and *Camp* to the present case, we respectfully urge the Court to reconsider

those holdings in view of the specific legislative history of the Administrative Procedure Act set forth above.

This case does not involve the "promulgating of policy-type rules or standards," or "across-the board" rate increases which are applicable to all customers. *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 245-46 (1973). Nor is it a case which involves "rulemaking procedures in their most pristine sense." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, —— U.S. ——, ——, 55 L.Ed 2d 460, 467 (1978). The disputed facts are "adjudicative" rather than "legislative," 1 K. Davis, ADMINISTRATIVE LAW TREATISE 412-13 (1958), and are relevant to the legality of the agency action challenged by Petitioners.

In enacting 16 U.S.C. § 825s, Congress could have provided for the Secretary to dispose of power at whatever rates the market would bear, in which case the costs of producing the power would not be pertinent to the validity of the rates. But the purpose of 16 U.S.C. § 825s was to provide rural areas with low cost power,[15] and Congress accordingly limited rates for such power to the cost of producing it. Consequently, the costs of producing power are facts relevant to the validity of rates approved by the FPC under authority of 16 U.S.C. § 825s. Moreover, they are facts which foreclose the exercise of agency discretion. Therefore, if these costs are disputed in a suit to enjoin enforcement of rates approved by the FPC, they must be tried in the reviewing court, because Congress has not provided for a trial at the agency level.

The Court of Appeals' holding that Petitioners were not entitled to try the alleged costs was apparently

[15] *See, e.g.*, 97 Cong. Rec. 10208 (1951).

premised on a conclusion that Petitioners had not established a triable issue of fact. The court's opinion says:

> "[A]ppellants disputed the cost figures upon which the rate increases were premised. However, no *specific* factual dispute was advanced; rather appellants contested the accuracy of the cost figures and called for their verification. We believe that neither the Secretary nor the Commission was obliged to make a second assessment of each and every cost figure derived by the Corps of Engineers in the R & R studies."

The court's conclusion would require that, to create a specific factual issue concerning costs alleged by the Secretary, customers must put in evidence their own version of the particular costs in question. This is impossible, because customers do not have access to the data necessary to determine such costs. The cost data is "particularly within the knowledge" of the Secretary. *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 456, at 615, 643 (1973). The problem was identified by Judge Wilkey at oral argument, when he asked Respondent's counsel:

> "But isn't the problem of the Petitioner here that they couldn't get hold of the facts on which to file affidavits and to make squarely an issue of facts, because they got no information as to what was behind, say, this sheet of figures, and others in the record," Tr. Or. Arg. 29.

Petitioners did everything possible under the circumstances to place the costs in issue. They submitted interrogatories which established that the disputed operation and maintenance costs included non-power costs, in violation of the statute. They put in evidence the

affidavit of an expert power witness who testified that the repayment studies and litigation affidavits relied on by Respondents did not identify the costs which the rates would recover.

Considering that SPA had the burden of proof with respect to the costs in question at the FPC level,[16] Petitioners' interrogatories and affidavit were more than sufficient to create a issue of fact with respect to those costs in the district court. Indeed, it is difficult to imagine any customer doing more under the circumstances. If Petitioners' acts were not sufficient to create a triable issue of fact, costs alleged by the Secretary in ratemaking proceedings under 16 U.S.C. § 825s are, for all practical purposes, immune from challenge by customers, even where, as here, the order approving the rates disregards or fails to evaluate standards mandated by Congress. In such case, rates could be set by administrative fiat.

CONCLUSION

We ask that the Court grant certiorari because of the importance of the issues in this case to the sound administration of the many federal power projects which are controlled by 16 U.S.C. § 825s and similar statutes.

[16] *See, e.g.*, U.S. Dept. of the Interior, Southeastern Power Administration, 53 F.P.C. ——, 40 Fed. Reg. 29127 (1975).

These issues have not been, but should be, decided by this Court.

Respectfully submitted,

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
Watergate 600 Building
Washington, D.C. 20037
(202) 337-0200

Attorneys for Petitioners

September 6, 1978

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September 1978, I caused to be mailed a copy of the foregoing Petition for Certiorari to each of the following: (1) the Solicitor General of the United States; (2) Bruce G. Forrest, Esquire, Attorney for Cecil D. Andrus, Peter C. King, and intervenor, the United States of America, Department of Justice, Washington, D.C. 20530; and (3) Steven A. Taube, Esquire, Attorney for Respondent members of the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426.

Robert F. Pietrowski, Jr.

Attorney for Petitioners

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-388

TEX-LA ELECTRIC COOPERATIVE, INC., and
SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC.,
Petitioners,

v.

CECIL D. ANDRUS, Individually, and as Secretary of the Interior, ET AL., *Respondents.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
Watergate 600 Building
Washington, D.C. 20037
(202) 337-0200

Attorneys for Petitioners

September 6, 1978

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1977

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No. 77-1445

TEX-LA ELECTRIC COOPERATIVE, INC., *Appellant*

v.

CECIL D. ANDRUS, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR, ET AL

77-1446

SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC., *Appellant*

v.

CECIL D. ANDRUS, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR, ET AL

Civil 1342-71

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: DANAHER, Senior Circuit Judge, and TAMM and WILKEY, Circuit Judges

(FILED MAY 15, 1978)

Judgment

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgment of the District Court appealed from herein is hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Memorandum

Appellants primarily challenge the procedures employed by the Secretary and the Commission in determining the rate increases in question. We find that the rates were promulgated in a manner fully consistent with applicable legal requirements. Appellants confuse the instant rate increases with rate applications made by a private utility under the Federal Power Act. Unlike rate applications made by a private utility under the Federal Power Act, the instant proceedings went forward under Section 5 of the Flood Control Act of 1944. The standards have been prescribed by the Congress. There [*sic*] are cost recovery rate increases, and the Secretary of the Interior was duty-bound to dispose of power and energy so as to encourage the most widespread use "at the lowest possible rates to consumers consistent with sound business principles." Rate schedules so evolved become effective only upon "confirmation and approval by the Federal Power Commission."

Moreover, Congress clearly contemplated that the public interest requires that the Government recover the cost of producing and transmitting electric energy, an important factor in the determination of which is to include the "amortization of the capital investment allocated to power over a reasonable period of years."

Before us are proceedings involving cost recovery rate increases, the procedural requirements respecting which, under Section 5 consist of notice and the opportunity to submit written comments.

We are not shown that the appellees in any manner have failed to execute the duties devolving upon them. The requirements were met in this case.

No more was required; no formal hearings were necessary; appellees were not required to respond to every comment submitted by appellants. *Associated Electric Power Cooperative* v. *Morton*, 507 F.2d 1167 (D.C. Cir.

1974). *See Vermont Yankee Nuclear Corp.* v. *NRDA*, 46 L.W. 4301 (1978). Where, as here, all interested parties, including appellants—who were the only contractual customers for the power of each dam—were fully notified of the proposed rate increases and of their right to submit written comments thereon, the rates set are not invalid because this information was not also published in the *Federal Register*. Appellants were not adversely affected by lack of formal publication; *see Hogg* v. *United States*, 428 F.2d 274 (6th Cir. 1970), and they had actnal and timely notice of the information, 5 U.S.C. § 522(a)(1)(C). Moreover, the appellants' opportunity to comment on the rate increases fully satisfied due process requirements. *Associated Electric Power Cooperative* v. *Morton, supra. See United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224 (1973). The mere presence of technical issues in and of itself is insufficient to support a requirement for evidentiary hearings. *See O'Donnell* v. *Shaffer*, 491 F.2d 59 (D.C. Cir. 1974).

We further conclude that the District Court was correct in granting appellees' motion for summary judgment. No genuine *factual* dispute existed. Appellants sought to defeat appellees' motion for summary judgment by attacking appellees' R & R method on two grounds: First, they disputed appellees' use of the R & R method, seeking to substitute the "cost of service" method. However, use of the R & R method was reasonable and fully consistent with § 5 of the Act, and appellant's preference for an alternative method did not raise a "factual" dispute. Second, appellants disputed the cost figures upon which the rate increases were premised. However, no *specific* factual dispute was advanced; rather appellants contested the accuracy of the cost figures and called for their verification. We believe that neither the Secretary nor the Commisison was obliged to make a second assessment of each and every cost figure derived by the Corp of Engineers in the R & R studies.

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

SEPTEMBER TERM, 1977

[Filed June 8, 1978]

No. 77-1445

Civil Action #1219-71

TEX-LA ELECTRIC COOPERATIVE, INC., *Appellant*

v.

CECIL D. ANDRUS, Individually and as
Secretary of the Interior, et al

No. 77-1446

Civil Action #1342-71

SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC., *Appellant*

v.

CECIL D. ANDRUS, Individually and as
Secretary of the Interior, et al

BEFORE: Danaher, Senior Circuit Judge; Tamm and Wilkey, Circuit Judges

Order

Upon consideration of the petition for rehearing filed by appellant in the above referenced cases, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam
For the Court:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

APPENDIX C

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1219-71

TEX-LA ELECTRIC COOPERATIVE, INC., *Plaintiffs*,

v.

ROGERS C. B. MORTON, et al., *Defendants*

SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC., *Plaintiff*,

v.

ROGERS C. B. MORTON, et al., *Defendants*

Civil Action No. 1342-71

(FILED APRIL 1, 1977)

Order

These consolidated cases are now before the Court on cross-motions by the parties for summary judgment. The court has carefully examined the voluminous record in these cases and has concluded that the rates set by defendants comport in all respects with the requirements of Section 5 of the Flood Control Act of 1944, 16 U.S.C. § 825s. It is entirely appropriate and indeed mandated by Congress that, in setting these rates, the government should seek to recoup its investment as well as the costs of producing and transmitting electric energy. And the Court finds that the method by which the government has chosen to recoup its investment and costs is in no sense arbitrary and capricious, but rather is perfectly reasonable. Moreover, inasmuch as plaintiffs received actual notice of the proposed rate increases and an opportunity to submit written comments on them, the Court finds that more than ample process has been accorded plaintiffs in these cases.

See Associated Electric Cooperative, Inc. v. *Morton*, 507 F.2d 1167 (D.C. Cir. 1974).

Accordingly, plaintiffs' motions for summary judgment must be denied and defendants' motions granted in both cases. Judgment must be awarded to the defendants on their counterclaims and plaintiffs are instructed to remit to the government all outstanding charges, as indicated in the counterclaims.

These cases are hereby dismissed.

So ORDERED.

/s/ WILLIAM B. BRYANT
CHIEF JUDGE

Dated: March 31, 1977

APPENDIX D

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Lawrence J. O'Connor, Jr.,
John A. Carver, Jr., and
Albert B. Brooke, Jr.

Docket No. E-7201

UNITED STATES DEPARTMENT OF THE INTERIOR
SOUTHWESTERN POWER ADMINISTRATION
SAM RAYBURN DAM PROJECT

(FILED MARCH 5, 1971)

Order Confirming and Approving Rates and Charges

(Issued March 5, 1971)

The Secretary of the Interior, acting on behalf of Southwestern Power Administration (SWPA) and pursuant to Section 5 of the Flood Control Act of 1944 (58 Stat. 887, 890), filed a request with the Federal Power Commission on June 3, 1970, as amended on December 17, 1970, in Docket No. E-7201 for confirmation and approval of new and higher rates and charges for the sale of all electric power and energy generated at the Sam Rayburn Dam Project (Project) to the Sam Rayburn Dam Electric Cooperative, Inc. (Cooperative) for the period beginning January 1, 1971 and ending July 1, 1976.

The Project is a hydroelectric development located on the Angelina River, Neches River Basin, in the State of Texas, and operated by the U.S. Army Corps of Engineers. There are two 26,000 kw generating units now in commercial operation at the Project, which is isolated from SWPA's main integrated electric system. The transmission facilities for receiving and delivering the electric power and energy produced at the Project are provided by Gulf

States Utilities Company (Gulf States) in accordance with certain contractual arrangements hereinafter described.

The Cooperative's members are municipally-owned and cooperatively-owned electric systems operating in eastern Texas and southwestern Louisiana. Under contractual arrangements between (1) SWPA and the Cooperative and (2) the Cooperative and Gulf States, the total output of the Project is sold by SWPA to the Cooperative and then resold by the Cooperative to Gulf States, which credits the account of the Cooperative each month by an amount equal to the total compensation paid by the Cooperative to SWPA. In accordance with the Cooperative-Gulf States contract, amounts of electric energy equal in the aggregate to the average annual electric energy generated at the Project are supplied and delivered each year by Gulf States to four municipal members of the Cooperative, namely, the Cities of Jasper, Liberty, and Livingston, Texas, and the Town of Vinton, Louisiana. In addition, Gulf States, under its contract with the Cooperative, supplies and delivers the total electric power requirements of two cooperative members of the Cooperative, namely, Sam Houston Electric Cooperative and Jasper-Newton Electric Cooperative.[1]

The proposed rates and charges are designed to supersede the rates and charges approved by Commission order issued April 30, 1965 (33 FPC 930) for the period terminating June 30, 1970, which approval was subsequently extended through December 31, 1970 by Commission orders issued June 29 and October 2, 1970, all in the above docket.

SWPA originally requested that its annual charge for the sale of the entire output of the Project to the Cooperative be increased from $950,004 to $1,050,150. Subsequently,

[1] Gulf States' rate schedules for wholesale electric service to the Cooperative and its members are on file with the Commission pursuant to the requirements of Section 205 of the Federal Power Act.

however, SWPA amended its request and now seeks an annual charge of $1,030,000.

In support of its proposed rate increase, SWPA submitted to the Commission an Average Rate and Repayment Study, including Summary Tables. That data shows some of the assumptions and estimates relied upon by SWPA in 1965 in seeking approval of the annual charge of $950,004 for the sale of the Project output must be reconsidered or revised in the light of subsequent experience and developments. It was assumed, for instance, that the second generating unit at the Project would be in commercial operation by July 1, 1965, although this did not actually occur until about three years later. Furthermore, the capital investment allocated to electric power in the Project originally amounted to $22,695,000, whereas such investment has now grown by $153,000 to $22,848,000. Similarly, the annual operating expenses for the production of electric power at the Project were initially estimated to be $108,000, but are now estimated to be $149,800, an increase of $41,800. In addition, the portion of SWPA's annual administrative and general expenses allocated to the Project has been increased from $23,000 to an average of more than $47,000. On the other hand, the estimated annual cost of replacements required during the 50-year repayment period has been reduced from $28,000 to about $18,000.

SWPA's proposed rates and charges for the sale of the Project output have been reviewed in the light of the requirements of Section 5 of the Flood Control Act of 1944 that "Rate schedules shall be drawn having regard to the recovery * * * of the cost of producing and transmitting * * * electric energy, including the amortization of the capital investment * * * over a reasonable period of years." That review shows that the annual charge of $1,030,000 for which SWPA now seeks Commission approval is the minimum amount necessary to obtain sufficient revenues to (1) pay all operating expenses related to electric power

production at the Project and (2) amortize the investment in electric power facilities at the Project within 50 years after the commencement of commercial operation of the Project's second generator.

The Cooperative, Gulf States, and the Corps of Engineers were furnished copies of SWPA's request for a rate increase, together with supporting data, and were invited to submit comments and suggestions with respect thereto. The Cooperative, by letter filed with the Commission on August 10, 1970, contended that the rate increase sought by SWPA was not needed to meet the payout requirements under the Flood Control Act of 1944 and requested that the Commission extend its approval of SWPA's current rates and charges "until such time as SPA [SWPA], the Corps of Engineers, and the * * * Cooperative have determined, through appropriate studies and negotiations, whether * * * any rate increase is necessary, and if so, whether * * * this power and energy can be sold to us or anyone else for a higher cost than it is bringing today." In support of its contention and request, the Cooperative stated, among other things, that (1) the repayment period of 50 years for the Project should start not earlier than fiscal year 1970 instead of fiscal year 1966 as shown in SWPA's computations since it was not until fiscal year 1969 that commercial operation of the second generating unit commenced and the full reservoir condition and normal reservoir operating levels occurred;[2] (2) the general administrative costs of SWPA are allocated to the Project on an unrealistic basis and the allocated portion of such costs is excessive; and (3) remote control operation of the Project should be investigated to determine whether the operation and maintenance expenses of the Corps of Engineers could thereby be reduced.

[2] SWPA's Average Rate and Repayment Study, Section I, filed with the Commission on June 3, 1970, shows that the Project's second generator commenced commercial operation in fiscal year 1968.

Gulf States, by letter filed with the Commission on September 14, 1970, explained that it is concerned with SWPA's proposed rate increase for sales to the Cooperative since Gulf States is contractually obligated to pay the Cooperative for electric energy at the same rate paid by the Cooperative to SWPA. Gulf States questioned the accuracy or appropriateness of the basis upon which various allocations were made by SWPA to the Project operating expenses or capital investment in setting the proposed rates and charges for electric power. It was contended in particular by Gulf States that SWPA should allocate a greater portion of the Project capital investment to recreation and flood control and a lesser portion of such investment to electric power than is presently the case. In this connection, we note that the Project costs used in SWPA's repayment study are from an allocation of costs made by the Corps of Engineers.

No comments or suggestions concerning SWPA's rate increase request were received by the Commission from the Corps of Engineers.

The Cooperative and Gulf States were also furnished copies of SWPA's December 17, 1970 amendment to its rate request whereby the proposed annual increase was reduced from approximately $100,000 to approximately $80,000. No comments or suggestions upon that amendment were received by the Commission from Gulf States. The Cooperative, however, by letter filed with the Commission on December 30, 1970, requested, in substance, that it (the Cooperative) be given until March 31, 1971 to study and comment upon SWPA's amendment. SWPA filed its objections to the Cooperative's request on January 13, 1971. The Commission, by letter dated January 28, 1971, informed the Cooperative that any comments or suggestions which it wished to submit for the Commission's consideration in connection with SWPA's amended rate filing should be submitted not later than February 12, 1971. The

Cooperative on February 10, 1971 filed a telegram with the Commission seeking again until March 31, 1971 for submittal of comments. In support of its request of February 10, 1971 for additional time, the Cooperative indicated that it did not have a paid full-time staff and that its comments must be prepared by persons having other duties, thereby necessitating more time for study.

We appreciate the problems cited by the Cooperative in reviewing and commenting upon SWPA's rate filing, but we cannot ignore the responsibility of SWPA to avoid delays in complying with the Congressional directions respecting the revenue needs of the Project. We have pointed out that our study of SWPA's rate request, as amended, disclosed that the proposed annual charge of $1,030,000 is the minimum amount necessary to meet the statutory payout requirements. Furthermore, SWPA's reduction of its proposed rate increase reflects an accommodation, in principal, with two of the main objections raised by the Cooperative to that rate increase (in its comments heretofore submitted to the Commission or to SWPA) by (1) postponing the commencement of the repayment period for the Project until after both of its generating units were in commercial operation, and (2) amortizing during the scheduled repayment period a portion only of the cost of any replacement item for the electric facilities of the Project where the service life of that item extends beyond the expiration of such period. Under the circumstances set forth above, we believe that we would not be justified in putting off action on SWPA's proposed rate increase and, therefore, we cannot allow the Cooperative more time for preparation and submittal of additional comments in this matter. In giving long-term approval to new rates and charges for SWPA's sales to the Cooperative, however, we do so for a period of approximately five years in accordance with our established practice rather than for the longer period sought by SWPA.

THE COMMISSION FINDS:

The proposed rates and charges of SWPA for the sale of all electric power and energy generated at the Sam Rayburn Dam Project to the Cooperative in the amount of $1,030,000 per year ($85,833.34 per month), all as described above, for the period beginning with the date of issuance of this order and ending not later than December 31, 1975, will not be inconsistent with the provisions of the Flood Control Act of 1944.

THE COMMISSION ORDERS:

The proposed rates and charges of SWPA for the sale of all electric power and energy generated at the Sam Rayburn Dam Project to the Cooperative in the amount of $1,030,000 per year ($85,833.34 per month), all as described above, are hereby confirmed and approved for the period beginning with the date of issuance of this order and ending not later than December 31, 1975.

By the Commission.
(SEAL)

Kenneth F. Plumb,
Acting Secretary.

APPENDIX E

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Lawrence J. O'Connor, Jr.,
John A. Carver, Jr.,
and Albert B. Brooke, Jr.

Docket No. E-6943

UNITED STATES DEPARTMENT OF THE INTERIOR
SOUTHWESTERN POWER ADMINISTRATION
NARROWS DAM PROJECT

(FILED JANUARY 22, 1971)

Order Confirming and Approving Rates and Charges

(Issued January 22, 1971)

The Secretary of the Interior, acting on behalf of Southwestern Power Administration (SWPA), filed a request with the Federal Power Commission on May 25, 1970, as amended on December 11, 1970, in Docket No. E-6943, pursuant to Section 5 of the Flood Control Act of 1944 (58 Stat. 887, 890), for confirmation and approval of new and higher rates and charges for the sale of all electric power and energy generated at the Narrows Dam Project (Project) to Tex-La Electric Cooperative, Inc. (Tex-La) for the period beginning January 1, 1971, and ending June 30, 1975.

The Project, located on the Little Missouri River in southwestern Arkansas in the service area of Southwestern Electric Power Company (SWEPCO), is isolated from SWPA's main integrated electric system and SWEPCO operates the only transmission line interconnecting with the Project. There are three 8,500 kw generating units now in operation at the Project.

Tex-La is an organization composed of cooperatively-owned and municipally-owned electric systems operating

in eastern Texas and Louisiana. Tex-La does not own or operate an electric transmission system. Under contractual arrangements between Tex-La and SWEPCO, all electric power and energy generated at the Project and purchased by Tex-La from SWPA is delivered to SWEPCO. In return for such deliveries and additional purchases by Tex-La from SWEPCO, SWEPCO supplies the total electric power requirements of Tex-La's cooperative and municipal members referred to above.

The proposed rates and charges are designed to supersede the rates and charges approved by the Commission on August 26, 1965 (34 FPC 608) for the period terminating June 30, 1970, which approval was subsequently extended through December 31, 1970, by Commission orders issued June 26 and October 2, 1970, all in the above docket.

SWPA originally requested that its annual charge for the sale of the entire output of the Project to Tex-La be increased from $367,992 to $468,000. Subsequently, however, SWPA amended its request and now seeks an annual charge of $465,000.

SWPA represents that the currently approved annual rate of approximately $368,000 for the sale of the Project output was computed on the basis of amortizing the investment in electric power at the Project during an 83 year period from the date of installation of the third generating unit or 100 years from the date on which the Project commenced commercial operation. In order to secure sufficient revenues to amortize the above-mentioned investment within 50 years from the date of installation of the third unit, SWPA filed the pending request for approval of an increase in the annual rate to Tex-La.

In support of its request as originally filed for an additional $100,000 annually in the rate for the sale of the output of the Project, SWPA submitted to the Commission a rate and repayment study. It shows that an annual charge of approximately $468,000 would be required to produce

sufficient revenues to amortize the investment in the electric power facilities at the Project during fiscal year 2020, which is 50 years after the third generating unit at the Project commenced commercial operation.

Tex-La and SWEPCO were furnished copies of SWPA's request for a rate increase and were invited to submit comments and suggestions with respect thereto. Tex-La filed with the Commission a letter dated June 19, 1970 wherein Tex-La stated its objections to the proposed rates, asked that the Commission hold an evidentiary hearing thereon, and asked further that approval of such rates not be granted until Tex-La was given an opportunity to be heard. No comments or suggestions were received by the Commission from SWEPCO.

In addition, Tex-La and SWEPCO were furnished copies of SWPA's amendment to its request whereby the proposed annual rate increase was reduced from approximately $100,000 to approximately $97,000. Thereafter Tex-La, by telegram filed on its behalf with the Commission on December 22, 1970, requested that the Commission extend for an additional 60 days its approval of SWPA's current rates and charges for the sale of the Project output to Tex-La. In seeking that extension, Tex-La referred to the negotiations among SWPA, Tex-La and SWEPCO concerning new contractual arrangements for the marketing of the Project output, including new rate and delivery terms and conditions, and stated that such negotiations have reached the point where only one issue remains unresolved, namely, the disposition of the energy in SWPA's electric system which is not contractually obligated. Tex-La represented that settlement of that issue is possible in the event that the requested extension is granted. SWPA, by telegram filed with the Commission on December 29, 1970, asked that the Commission deny Tex-La's request for an extension of approval of the current rates. In opposing such extension, SWPA contended that it was sought for the purpose of

delaying Commission action on the proposed rate increase rather than for the purpose of continuing negotiations for new contractual arrangements, which SWPA represents as being "at an impasse with no present prospect of agreement in the immediate future."

It is clear from the foregoing that the 83 year payout period for the Project under the currently approved rates of SWPA does not comply with the requirements of the Flood Control Act of 1944, Section 5, that rate schedules "shall be drawn having regard to the *** amortization of the capital investment allocated to power over a *reasonable* period of years" (emphasis supplied). For that reason, SWPA seeks approval of new and higher rates which may result in the payout being achieved within 50 years after the Project's newest generating unit became commercially operable. We have often determined that 50 years is a "reasonable period" within the meaning of the statute. Furthermore, our approval at this time of the proposed rate increase should not prejudice continuance of negotiations by SWPA, Tex-La and SWEPCO for the purpose of revising their existing contractual arrangements to reflect changes in the operations of their respective electric systems. We do not believe that we would be justified in delaying or otherwise impeding SWPA's attempt to amortize the investment of the United States in the Project in accordance with the statutory payout requirements, particularly where, as here, such delay is not necessary to accomplish the actions cited in support of a delay. In the event that further negotiations among SWPA, Tex-La and SWEPCO result in agreement upon new electric service arrangements, thereby making it appropriate to change those rates of SWPA which we are approving by this order, we will, of course, consider any applications for approval of such rate changes. Under these circumstances we also believe that we would not be justified in delaying the effectiveness of SWPA's proposed rates pending an evi-

dentiary hearing on the objections to those rates raised by Tex-La.

THE COMMISSION FINDS:

The proposed rates and charges of SWPA for the sale of all electric power and energy generated at the Narrows Dam Project to Tex-La in the amount of $465,000 per year ($38,750 per month), all as described above, for the period beginning with the date of issuance of this order and ending not later than June 30, 1975, will not be inconsistent with the provisions of the Flood Control Act of 1944.

THE COMMISSION ORDERS:

The proposed rates and charges of SWPA for the sale of all electric power and energy generated at the Narrows Dam Project to Tex-La in the amount of $465,000 per year ($38,750 per month), all as described above, are hereby confirmed and approved for the period beginning with the date of issuance of this order and ending not later than June 30, 1975.

By the Commission.
(SEAL)

Gordon M. Grant,
Secretary.

APPENDIX F

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APPENDIX G

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SEE FOLDOUT NO. 2

APPENDIX H

APPENDIX H

STATUTORY PROVISIONS INVOLVED

Flood Control Act of 1944, 58 Stat. 890, as amended, § 5:

Section 5, 16 U.S.C. § 825s:

> "Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to **[1]** encourage the most widespread use thereof **[2]** at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to **[3]** the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sale shall be deposited in the Treasury of the United State as miscellaneous receipts."

Administrative Procedure Act of 1946, 60 Stat. 237, as revised 80 Stat. 381, 5 U.S.C. § 551 et seq.:

Section 3, 5 U.S.C. § 552(a)(1):

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public——

"(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

"(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

"(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

"(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the

Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

Section 4, 5 U.S.C. § 553:

"(a) This section applies, according to the provisions thereof, except to the extent that there is involved——

"(1) a military or foreign affairs function of the United States; or

"(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

"(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include——

"(1) a statement of the time, place, and nature of public rule making proceedings;

"(2) reference to the legal authority under which the rule is proposed; and

"(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply——

"(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

"(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

"(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

"(d) The required publication on service of a substantive rule shall be made not less than 30 days before its effective date, except——

"(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

"(2) interpretative rules and statements of policy; or

"(3) as otherwise provided by the agency for good cause found and published with the rule.

"(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

Section 10(e), 5 U.S.C. § 706:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall——

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be——

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

No. 78-388

In the Supreme Court of the United States

OCTOBER TERM, 1978

TEX-LA ELECTRIC COOPERATIVE, INC., and
SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC.,
PETITIONERS

v.

JAMES R. SCHLESINGER, SECRETARY OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

LEONARD SCHAITMAN
BRUCE G. FORREST
Attorneys
Department of Justice
Washington, D.C. 20530

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CITATIONS

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum of the court of appeals (Pet. App. 3a-4a) and the order of the district court (Pet. App. 6a-7a) are not reported. The orders of the Federal Power Commission (Pet. App. 8a-19a) are reported at 45 F.P.C. 183 and 394.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1978. A petition for rehearing was denied on June 8, 1978. The petition for a writ of certiorari was filed on September 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Department of the Interior and the Federal Power Commission gave proper consideration to the factors set forth in Section 5 of the Flood Control Act of 1944 in proposing and approving the hydroelectric power rate increases challenged in this case.

2. Whether the requirements of due process were satisfied by the procedures employed by the agencies in proposing and approving the challenged rate increases.

STATEMENT

The Southwestern Power Administration ("SPA") was established by the Secretary of the Interior[1] in 1943 to market the hydroelectric power generated at

[1] The Secretary of the Interior has been named as one of the federal respondents throughout this litigation. The issues involved in this case will continue to be determined under the statutes setting forth the authority of the Secretary of the Interior. See note 7, *infra*. Pursuant to Section 705 (e) of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 607, however, we have substituted the Secretary of Energy for the Secretary of the Interior as the principal respondent in this petition.

certain projects of the Army Corps of Engineers. The SPA markets the entire hydroelectric output of one of these projects, the Narrows Dam, to petitioner Tex-La Electric Cooperative, Inc. ("Tex-La"). The entire output of another project, the Sam Rayburn Dam, is marketed to petitioner Sam Rayburn Dam Electric Cooperative, Inc. ("Sam Rayburn"). The hydroelectric power generated by these two projects is disposed of pursuant to Section 5 of the Flood Control Act of 1944, 16 U.S.C. 825s, which provides, in pertinent part, that

> the Secretary of the Interior * * * shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery * * * of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years.

In its 30-year history of marketing federal power, SPA has consistently failed to recover the costs of the projects assigned to its administration. The rates adopted by SPA have not recovered any of the principal investment of the United States of $453,600,000 in power operation and transmission facilities. Moreover, a deficit of approximately $37,700,000 in inter-

est on this principal had accrued as of June 30, 1969 (J.A. 290-291).[2] Accordingly, by order of August 15, 1968, the Federal Power Commission approved SPA system rate schedules until only September 1, 1969. 40 F.P.C. 291. The FPC called on the Secretary of the Interior and SPA " 'to make an overall review' " of SPA's operations and " 'to work out modifications of [SPA's] rate structures and contractual arrangements which are necessary to comply with the Flood Control Act of 1944' " (J.A. 291).

The rates challenged in this case were issued after the determination of SPA's Administrator that annual deficiencies existed with respect to the particular SPA projects from which petitioners obtain federal power.

1. The Narrows Project Rate Increase

Since September 1960 the entire output of the Narrows Dam had been sold to Tex-La. SPA's "Average Rate and Repayment Study—Narrows Dam—April 1970" indicated that, as of June 30, 1969, the Narrows Project had accrued a deficiency of over $819,000 (J.A. 295). The Secretary of the Interior approved the study and, on May 22, 1970, transmitted it to the Federal Power Commission with a request to increase the rate from $368,000 to $468,000 per year (J.A. 903-904). A copy of the study and the Secretary's transmittal were sent to Tex-La, which was notified of

[2] "J.A." refers to the 3-volume Joint Appendix filed in the court of appeals.

its opportunity to submit comments (J.A. 295-296). Tex-La submitted its comments to the FPC, protesting the proposed rate on a number of grounds. As a result of SPA's analysis of comments received, the Secretary of the Interior submitted to the FPC a revised proposed rate lowering the increase by $3,000 per year (J.A. 299, 889-890). The FPC approved the proposed rate increase as revised (Pet. App. 15a-19a).

Tex-La filed with the FPC a petition for rehearing (J.A. 864-869), and the FPC granted rehearing "for the purpose of giving further consideration to the matters set forth in [Tex-La's] petition" (J.A. 853-854). On April 29, 1971, the FPC rejected Tex-La's arguments and reaffirmed its approval of the revised rate (J.A. 846-849).[3]

2. The Sam Rayburn Project Rate Increase

Petitioner Sam Rayburn has purchased the entire output of the Sam Rayburn Dam project ever since the dam began producing power. A study titled "Average Rate and Repayment Study—Sam Rayburn

[3] A review of the costs associated with the Narrows Dam revealed that the rates charged to Tex-La still were insufficient to comply with the congressional mandate regarding repayment of project costs. For example, the rate increase in 1971 was based on the Corps of Engineers' estimate that operating and maintenance expenses for the period of 1971-1974 would be $604,000. The actual expenses for these years totaled $774,719. Similarly, while SPA's general administrative expense was estimated at $74,128, the actual expense was $80,812 (J.A. 303). As the result of these and other increases in costs, a further increase in the rate for Narrows Dam power was approved by the FPC in August 1976.

Dam—April 1970" indicated that from July 1, 1966, when commercial operation began, through June 30, 1969, federal revenues were $505,665 less than operating costs and capital charges. SPA determined from this study that an annual charge of $1,050,150 was required to recover the deficit that had accrued and to meet estimated operating costs and capital charges in the future (J.A. 305-306). Accordingly, on June 2, 1970, the Department of the Interior transmitted to the FPC a request for confirmation and approval of a new rate schedule for the sale of power and energy generated at the Sam Rayburn Dam in the amount of $1,050,150 per year, an increase of $100,-150 per year over the previous rate (J.A. 306).

After an intensive review of SPA's repayment study procedures, which considered criticisms by Sam Rayburn, among others, Interior advised the FPC that it was modifying its proposed rate increase downward from $1,050,150 per year to $1,030,000 per year (J.A. 307-308; 950-954; 979-980). In a letter dated January 28, 1971, the FPC invited petitioner Sam Rayburn to submit comments on the proposed rate as modified (J.A. 959). Sam Rayburn did not submit comments but, instead, sought an extension of time. On March 5, 1971, the FPC approved the proposed rates and denied petitioners' request for a further extension of time (J.A. 945-951). The Commission indicated that it could not further "ignore the responsibility of [SPA] to avoid delays in complying with

the Congressional directions respecting the revenue needs of the Project." [4]

3. Judicial Review

Petitioners commenced these consolidated actions, seeking judicial review of the 1971 rate increases. The government presented affidavits to explain how the cost estimates were made (J.A. 329-350) and how the data obtained from the Corps of Engineers were evaluated by the Department of the Interior and then subjected to further review on submission to the FPC (J.A. 289-328). James J. Stout, Chief of the FPC's Division of River Basins, explained that the proposed rates were subjected to independent and detailed review at the FPC and that the cost allocations were studied to insure "that those buying power paid only for power" (J.A. 396). The reasonableness of overhead and administrative expenses were tested along with interest, amortization, and replacement expenses. The proposed rate was also tested for commercial reasonableness against prices for alternative sources (J.A. 395-397).

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[4] As with the Tex-La project, the rate approved for the Sam Rayburn Dam project in 1971 proved insufficient. The proposed rate increase was based on a Corps of Engineers' estimate of operating and maintenance costs of $599,200 for the period 1971-1974. The actual expenses proved to be $742,253. SPA general and administrative expenses for 1971-1974 were estimated at $228,800; actual expenses were $262,002 (J.A. 311-312). A request for a further increase in the rate for Sam Rayburn Dam power is pending before the Secretary of Energy.

On this record, the district court granted summary judgment to the defendants, concluding that the rates comported with the requirements of Section 5 of the Flood Control Act and that ample and fair processes had been accorded to petitioners (Pet. App. 6a-7a). The court of appeals affirmed (*id.* at 3a-4a).

ARGUMENT

1. *a.* Petitioners urge (Pet. 15-18) that the challenged rates must be set aside because the Secretary of the Interior and the FPC did not sufficiently articulate the basis for the rate increases. They contend that the agencies did not consider the standards of Section 5 of the Flood Control Act of 1944 in approving the challenged rates. The substantial administrative record establishes, however, that increased operating costs and capital charges formed the basis for the rate increases.

In approving the rate increase for the Narrows Dam Project, the FPC stated (Pet. App. 18a) that the previously effective rate had failed to

> comply with the requirements of the Flood Control Act of 1944, Section 5, that rate schedules "shall be drawn having regard to the * * * amortization of the capital investment over a *reasonable* period of years" (emphasis supplied).

The Commission concluded that the increased rates proposed for the Narrows Dam and Sam Rayburn projects were necessary to recoup projected operating charges and to amortize the investment in power facilities over a 50-year period (Pet. App. 10a-11a, 14a, 19a). Although the Commission's Orders do not expressly invoke every element of the statutory standard,[5] the basis for the agency's action is clear and intelligible. There is no need for any additional articulation. See *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 595 (1945). See also *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System*, 419 U.S. 281, 286 (1974); *Erie-Lackawanna R.R. Co.* v. *United States*, 279 F. Supp. 316, 354-355 (S.D. N.Y. 1967), aff'd *sub nom. Penn Central Merger Cases*, 389 U.S. 486 (1968).[6]

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[5] Petitioners assert (Pet. 15) that the administrative record fails to reveal that the FPC considered whether the challenged rates would achieve the " 'most widespread use' " of project power, as Section 5 provides. See 16 U.S.C. 825s. This language in Section 5, however, preserves the exercise of the widest administrative discretion by the Secretary and provides no judicially enforceable standards. See *Strickland* v. *Morton*, 519 F.2d 467, 469-470 (9th Cir. 1975). In any event, the widespread use requirement refers to the manner in which the power is ultimately transmitted and utilized; the statutory rate requirement is set forth in the different portion of Section 5 specifying that rates shall be set at the lowest possible levels having "regard to the recovery * * * of the cost of producing and transmitting such electric energy, including the amortization of the capital investment * * *." 16 U.S.C. 825s. The agency's enquiry focused properly on the statutory rate-setting standards.

[6] Petitioners' reliance (Pet. 16-17) on *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83 (1957), and *FPC* v. *Texaco, Inc.*, 417 U.S. 380 (1974), is unavailing. In *Schaffer* the Court stated that the Interstate Commerce Commission had acted without considering a "critical factor" of the National Transportation Policy established to guide its decision-

Moreover, because the contested rates in this proceeding concern the sale of public property, they are not subject to the procedural requirements of the Administrative Procedure Act, including the requirement of a "concise general statement" of the basis for agency action. See 5 U.S.C. 553(a)(2); 5 U.S.C. 553(c).[7] Petitioners' contention (Pet. 18) that formal findings should nonetheless be required in this case is not supported by *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), on which they rely. In *Overton Park* the Court stated only that "although formal findings may be required in some cases in the absence of statutory directives when the nature of the agency action is ambiguous, those situations are very rare." *Id.* at 417. Here, however, there is no ambiguity about the basis for the administrative action. As the court of appeals correctly observed, these "are cost recovery rate increases" that are designed to recover operating and capital charges pursuant to Section 5 of the Act (Pet. App. 3a).

b. Petitioners contend that the agency improperly included, as part of the operations charges to be recovered by the rate increase, expenses designed for recreation and wildlife activities associated with one of the two dam projects (Pet. 13). We agree with petitioners that Section 5 does not authorize the recovery of non-power costs from hydroelectric power customers. This specific objection was not, however, urged by petitioners in opposition to the entry of summary judgment in the district court or in the court of appeals, and it is thus not properly presented for review in this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, the FPC has subsequently reviewed petitioners' allegation and concluded that, while the costs involved were placed as an accounting matter in a recreation account, the charges were in fact related to the provision of power at the project. FPC Order, Docket No. E-6943, Aug.

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making. 355 U.S. at 90. Here, however, it is apparent that the "critical" statutory factors were the basis for the agency's determination that a rate increase should be approved. In *Texaco* the Court remanded for further proceedings where the Commission had erroneously concluded that a statutory requirement was inapplicable to its particular action in that case. 417 U.S. at 394-395. There is, however, no suggestion in this case that the agency refused to consider any of the statutory requirements of Section 5 in its approval of the rate increases.

[7] On October 1, 1977, the power marketing functions of the Secretary of the Interior were transferred to the Secretary of Energy. Section 302(a)(1)(E), 91 Stat. 578. Under the Organizational Act of the Department of Energy, the exemption from rulemaking requirements established in 5 U.S.C. 553(a)(2) for matters relating to public property and contracts is no longer available. Section 501(b)(3), 91 Stat. 588.

The removal of the rulemaking exemption is, however, irrelevant to the proper disposition of this case. The Department of Energy Organization Act is not intended to apply to pending litigation. Section 705(c) of the Act, 91 Stat. 607, provides that:

> the provisions of this Act shall not affect suits commenced prior to the date this Act takes effect, and * * * in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and effect as if this Act had not been enacted.

Since this suit commenced prior to October 1, 1977, judgment in this case is to be rendered "in the same manner and effect as if this Act had not been enacted." *Ibid.*

10, 1976, at 8. Petitioners' failure to raise this specific claim in the courts below prevents the determination of this essentially factual issue on this record.

2. Petitioners contend (Pet. 18-32) that they were denied an appropriate opportunity to contest the basis for the challenged rates, both before the agencies and in the courts.

The court of appeals correctly concluded (Pet. App. 4a) that the agency proceedings fully comported with due process requirements. Petitioners were afforded due notice of the rate increases and the basis therefor, and they were given an opportunity to submit written comments on the proposed increases. In the context of this ratemaking proceeding, the requirements of due process were thus fully satisfied. *Associated Electric Cooperative, Inc.* v. *Morton*, 507 F. 2d 1167 (D.C. Cir. 1974). See *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973). Moreover, as we pointed out above, this case involves the disposition of public property, and the agency's action was therefore not subject to the procedural requirements of the APA. Because, at the time these rates were approved, there was no statute specifying any procedures to be employed by the agency in adopting rates for the sale of federal power, there is no basis for petitioners' claim that additional hearing procedures should have been utilized. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 547-549 (1978).

Petitioners argue, nonetheless, that a trial-type proceeding should have been held in the district court as

part of a de novo review of the validity of the agency's rate determination (Pet. 14-30). They contend that such a proceeding is authorized by Section 10(e) of the APA, which provides in part that courts may "hold unlawful and set aside agency action, findings, and conclusions found to be—* * * (F) unwarranted by the facts to the extent the facts are subject to trial de novo by the reviewing court." 5 U.S.C. 706(2)(F). This Court has never held, however, that the facts underlying an informal rulemaking proceeding are subject to trial de novo in the reviewing court. Indeed, as petitioners concede, in *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra*, the Court held that de novo review is permissible only (1) where the action is adjudicatory in nature and the agency's fact-finding procedures are inadequate, and (2) when issues not before the agency are presented in enforcement proceedings. 401 U.S. at 415.[8] Since this case involves a rulemaking, rather than an adjudicative or enforcement proceeding, de novo review is not appropriate. The determination of the appropriate rate

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[8] Petitioners suggest that the Court should reexamine this aspect of its decision in *Overton Park* in light of legislative history that petitioners believe supports a broader construction of the de novo review provision of 5 U.S.C. 706(2)(F). But the history to which petitioners refer (Pet. 20-21) concerns the situation where no agency hearing precedes the promulgation of a challenged rule. Here, however, the agency conducted an informal rulemaking investigation and received evidentiary submissions from petitioners as well as the Corps of Engineers. This hearing procedure is ample for informal rulemaking.

to be charged in the disposition of federal hydroelectric power is assigned to the agency process; the function of judicial review is to determine that the agency has not acted arbitrarily or capriciously or otherwise not in accordance with law. 5 U.S.C. 706(2)(A). This limited judicial enquiry may properly be conducted on the basis of the record contested before the agency. An adversary, trial-type presentation of competing technical and economic data before the district court would be both unnecessary and inappropriate for this purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

LEONARD SCHAITMAN
BRUCE G. FORREST
Attorneys

NOVEMBER 1978

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-388

TEX-LA ELECTRIC COOPERATIVE, INC., and
SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC.,
Petitioners,

v.

CECIL D. ANDRUS, Individually, and as Secretary of the Interior, ET AL., *Respondents.*

REPLY BRIEF FOR PETITIONERS

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
Watergate 600 Building
Washington, D.C. 20037
(202) 337-0200

Attorneys for Petitioners

December 27, 1978

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Although captioned a "Reply Brief," this document does not present additional argument concerning the issues in the present case. It instead identifies certain misstatements of fact which appear in Respondent's brief in opposition. Petitioners had intended to identify these misstatements of fact in a letter to the Court, but were advised by the clerk's office that such a letter would not be distributed to the Court with the briefs. Petitioners were further advised that the only way to assure consideration by the Court of a communication concerning these misstatements of fact is to designate the communication a "reply brief." Accordingly, Petitioners submit herewith their reply

brief, in which they respectfully ask the Court's attention to the following:

I. RE ISSUES RAISED IN THE LOWER COURTS

At page 11 of their brief in opposition, Respondents make the following statement:

> "Petitioners contend that the agency improperly included, as part of the operations charges to be recovered by the rate increase, expenses designed for recreation and wildlife activities associated with one of the two dam projects (Pet. 13). We agree with petitioners that Section 5 does not authorize the recovery of non-power costs from hydroelectric power customers. This specific objection was not, however, urged by petitioners in opposition to the entry of summary judgment in the district court or in the court of appeals, and it is thus not properly presented for review in this Court."

And again, at page 12 of their brief, Respondents say:

> "Petitioners' failure to raise this specific claim in the courts below prevents the determination of this essentially factual issue on this record."

Contrary to Respondents' allegations, Petitioners raised the "specific objection" in every brief filed in the court of appeals and at oral argument. At page 46 of their initial brief, Petitioners said:

> "The inclusion of recreation and fish and wildlife expenses in the operation and maintenance costs to be recovered by rates set under authority of 16 U.S.C. § 825s is unlawful, because that statute only allows recovery of 'the cost of producing and transmitting . . . electric energy.'"

At page 23 of their reply brief, Petitioners said:

> "They [*i.e.*, Petitioners] filed a motion to produce documents and two extensive sets of interrogatories (the answers to which . . . showed that the rates unlawfully recovered recreation and fish and wildlife costs)." (Footnote omitted.)

(The interrogatories referred to asked:

> ("What percentage of the operating and maintenance costs assigned to power is actually used for recreation and fish and wildlife at the Narrows Dam project?"

(The Corps of Engineers, which operates Narrows Dam, answered:

> ("On a cumulative basis from FY 65 to FY 73, 4.49% of Operating and Maintenance costs assigned to Power was actually used for Recreation and Fish and Wildlife on the Narrows Dam Project.")

At oral argument, Petitioners' counsel raised the specific objection on three separate occasions. Tr. Or. Arg. 10-11, 14-15, 45.

Finally, in their petition for rehearing, Petitioners said at pages 7-8:

> "Appellants also submitted interrogatories to the Corps of Engineers, the answers to which revealed, *inter alia,* that the rate for Narrows Dam recovers non-power costs. Answer to Question No. 33 of Plaintiff's Second Set of Interrogatories. This answer is prima facie evidence that the rate for Narrows Dam is unlawful under 16 U.S.C. § 825s, which, by its terms, allows only recovery of power costs." (Footnote omitted.)

In view of the number of times that Petitioners objected specifically to the inclusion of fish and wildlife and recreation costs in the Narrows Dam rate, Respondents' statement that the objection was not made is incomprehensible.

II. RE SUBMISSIONS AT THE AGENCY LEVEL

At pages 20-21 and 25-28 of their petition for certiorari, Petitioners set forth certain parts of the legislative history of the Administrative Procedure Act ("APA"). Petitioners believe this history shows unequivocally that Congress, when it enacted §§ 553(c) and 706(2)(F) of the APA, intended that, in rulemaking cases where the statute does not require a trial-type hearing (*i.e.*, in cases of informal rulemaking), disputed facts relevant to the validity of the rule would be tried in the district court. At page 13 of their brief in opposition, Respondents make the following statement:

> "But the history to which petitioners refer (Pet. 20-21) concerns the situation where no agency hearing precedes the promulgation of a challenged rule. Here, however, the agency conducted an informal rulemaking investigation and received evidentiary submissions from petitioners as well as the Corps of Engineers. This hearing procedure is ample for informal rulemaking."

It is not clear whether Respondents have simply confused their usage of the term "hearing,"[1] or whether,

[1] The above-quoted passage from Respondents' brief uses the term "hearing" twice. The passage makes sense only if both uses of the term "hearing" refer to the same kind of procedure, *i.e.*, either trial-type procedure or notice and comment procedure. However, the first sentence of the passage is correct only if "hearing" there refers to trial-type procedure (see excerpts from Senate and House Reports, Pet. 20-21, 25-28); and the reference to "hearing" in the last sentence presumably refers to notice and comment procedure, since informal rulemaking by definition does not involve trial-type procedures.

by reference to so-called "evidentiary submissions," they mean to imply that the procedures afforded Petitioners were in excess of those normally associated with informal rulemaking.

What *is* clear is that, contrary to Respondents' statement, the agency received no submissions—evidentiary or otherwise—from the Corps of Engineers. In the case of Sam Rayburn Dam, the agency twice requested comments from the Corps,[2] but the order approving the rate increase stated:

> "No comments or suggestions concerning SWPA's rate increase request were received by the Commission from the Corps of Engineers." (J.A. 949.)

Furthermore, the only submissions the agency received from Petitioners were comments questioning various aspects of the proposed rate increases. The

[2] On June 12, 1970, the Federal Power Commission's Bureau of Power wrote the Corps of Engineers asking for an explanation of the discrepancy between the Corps' costs shown in the Southwestern Power Administration's rate increase proposal and the Corps' costs shown in the Form No. 1 filed with the Commission by the Corps. J.A. 1059. On July 31, 1970, the Bureau of Power wrote the Corps again, asking for its response to the comments on the proposed rate increase filed by Petitioner Sam Rayburn Dam Electric Cooperative, Inc. J.A. 1008. Neither letter was answered by the Corps. J.A. 949.

agency approved the rate increases without responding to these comments.[3]

III. RE FORMAL FINDINGS OF FACT

Petitioners would also take this opportunity to point out a misstatement of their argument which appears in Respondents' brief at pages 10-11. There, Respondents state:

> "Petitioners' contention (Pet. 18 [sic]) that formal findings should nonetheless be required in this case is not supported by *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971), on which they rely."

Contrary to this statement, what Petitioners contend —and what they cite *Overton Park* in support of— is that:

> "The requirement that agency orders and rules evaluate relevant standards is not limited to cases where the enabling legislation requires formal findings of fact. *See Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 408-09, 419-20 (1971)." (Pet. 17.)

Thus, Petitioners do not contend that formal findings should be required in this case; they contend that

[3] Petitioners' comments are set forth at J.A. 170-72, 1002-07, 1020-26. The orders approving the rates without responding to the comments appear at J.A. 878, 945.

an evaluation of relevant standards should be required even though formal findings of fact are unnecessary.

Respectfully submitted,

NORTHCUTT ELY
FREDERICK H. RITTS
ROBERT F. PIETROWSKI, JR.
Watergate 600 Building
Washington, D.C. 20037
(202) 337-0200

Attorneys for Petitioners

December 27, 1978

Certificate of Service

I hereby certify that on the 27th day of December 1978, I caused to be mailed a copy of the foregoing Reply Brief to each of the following individuals at the Department of Justice, Washington, D.C. 20530: (1) the Solicitor General of the United States; (2) Barbara Allen Babcock, Assistant Attorney General; (3) Leonard Schaitman, Attorney; and (4) Bruce G. Forrest, Attorney.

/s/ Robert F. Pietrowski, Jr.
Robert F. Pietrowski, Jr.

Attorney for Petitioners

SOUTHWESTERN POWER ADMINISTRATION
AVERAGE RATE AND REPAYMENT STUDY
SAM RAYBURN DAM PROJECT

APPENDIX F

DECEMBER 1970
SUMMARY TABLE

(1) Year of Study		(2) Fiscal Year	(3) Gross Revenue $	(4) Corps O and M Expenses $	(5) SPA Operating Expenses Purchased Power $	(6) Service Charges $	(7) All Other $	(8) SPA Total $	(9) Corps and SPA Interest $	(10) Allocated For Depreciation and Repayment $	(11) Net Rev. From Operations $	(12) Downstream Benefits $	(13) Amount Avail. For Principal/Int. $	(14) Corps and SPA Interest $	(15) Principal $	(16) POWER INVESTMENT Beginning of Year $	(17) Added During Year $	(18) Balance To Be Repaid $	(19) Accumulated Annual Investment $	(20) Allowable Unpaid Balance $	Fiscal Year
	A	1966		106,973	0	0			4,506	48,162	−159,641	0	−106,973	4,506	−111,479		22,639,862	22,751,341	22,639,862		1966
	C	1967	481,035	122,296			31,166	31,166	574,208	76,878	−323,513		327,573	574,208	−246,635	22,751,341	1,751,878	24,749,854	24,391,740		1967
	T	1968	558,334	141,199			69,215	69,215	614,146	81,814	−348,040		347,920	614,146	−266,226	24,749,854	14,484	25,030,564	24,406,224		1968
1	U	1969	950,004	153,368			66,156	66,156	616,623	84,571	29,286		730,480	616,623	113,857	25,030,564	34,865	24,951,572	24,441,089		1969
2	A	1970	950,004	165,038			68,199	68,199	614,786	86,704	15,277		716,767	614,786	101,981	24,951,572	8,410	24,858,001	24,449,499		1970
	L																				
SUB-TOTAL			2,939,377	688,874			234,736	234,736	2,424,269	378,129	−786,631		2,015,767	2,424,269	−408,502		24,449,499				
3		1971	950,000	149,800			64,606	64,606	583,502	200,969	−48,877		735,594	583,502	152,092	24,858,001	−1,601,500	23,104,409	22,848,000		1971
4		1972	1,030,000				58,988	58,988	557,593	205,993	57,626		821,212	557,593	263,619	23,104,409	0	22,840,790			1972
5		1973					53,768	53,768	550,876	211,143	64,413		826,432	550,876	275,556	22,840,790		22,565,234			1973
6		1974					51,518	51,518	543,932	216,422	68,328		828,682	543,932	284,750	22,565,234		22,280,484			1974
7		1975					51,407	51,407	536,810	221,832	70,151		828,793	536,810	291,983	22,280,484		21,988,501			1975
8		1976					49,664	49,664	529,469	227,378	73,689		830,536	529,469	301,067	21,988,501		21,687,434			1976
9		1977					49,569	49,569	521,939	233,062	75,630		830,631	521,939	308,692	21,687,434		21,378,742			1977
10		1978					46,134	46,134	514,139	238,889	81,038		834,066	514,139	319,927	21,378,742		21,058,815			1978
11		1979					46,050	46,050	506,138	244,861	83,151		834,150	506,138	328,012	21,058,815		20,730,803			1979
12		1980					45,980	45,980	497,936	250,983	85,301		834,220	497,936	336,284	20,730,803		20,394,519			1980
13		1981							489,529	257,257	87,434			489,529	344,691	20,394,519		20,049,828			1981
14		1982							481,314	263,689	89,217			481,314	352,906	20,049,828	16,500	19,713,422	22,864,500		1982
15		1983							472,502	270,281	91,437			472,502	361,718	19,713,422	0	19,351,704			1983
16		1984							463,459	277,038	93,723			463,459	370,761	19,351,704		18,980,943			1984
17		1985					45,894	45,894	454,188	283,964	96,154		834,306	454,188	380,118	18,980,943		18,600,825			1985
18		1986							444,685	291,063	98,558			444,685	389,621	18,600,825		18,211,204			1986
19		1987							435,529	298,340	100,437			435,529	398,777	18,211,204	24,000	17,836,427	22,888,500		1987
20		1988							425,575	305,798	102,933			425,575	408,731	17,836,427	0	17,427,696			1988
21		1989							415,356	313,443	105,507			415,356	418,950	17,427,696		17,008,746			1989
22		1990							404,883	321,279	108,144			404,883	429,423	17,008,746		16,579,323			1990
23		1991							394,147	329,311	110,848			394,147	440,159	16,579,323		16,139,164			1991
24		1992							383,891	337,544	112,871			383,891	450,415	16,139,164	30,700	15,719,449	22,919,200		1992
25		1993							372,650	345,983	115,673			372,650	461,656	15,719,449	0	15,257,793			1993
26		1994							361,109	354,632	118,565			361,109	473,197	15,257,793		14,784,596			1994
27		1995							349,279	363,498	121,529			349,279	485,027	14,784,596		14,299,569		22,848,000	1995
28		1996							337,153	372,585	124,568			337,153	497,153	14,299,569		13,802,416			1996
29		1997							325,126	381,900	127,280			325,126	509,180	13,802,416	16,500	13,309,736	22,935,700		1997
30		1998							312,407	391,447	130,452			312,407	521,899	13,309,736	0	12,787,837			1998
31		1999							299,360	401,234	133,712			299,360	534,946	12,787,837		12,252,891			1999
32		2000							285,986	411,264	137,056			285,986	548,320	12,252,891		11,704,571			2000
33		2001							272,278	421,546	140,482			272,278	562,028	11,704,571		11,142,543			2001
34		2002							268,017	432,085	134,204			268,017	566,289	11,142,543	401,600	10,977,854	23,337,300		2002
35		2003							254,110	442,887	137,309			254,110	580,196	10,977,854	0	10,397,658			2003
36		2004							239,605	453,959	140,742			239,605	594,701	10,397,658		9,802,957			2004
37		2005							224,738	465,308	144,260			224,738	609,568	9,802,957		9,193,389			2005
38		2006							209,499	476,941	147,866			209,499	624,807	9,193,389		8,568,582			2006
39		2007							197,540	488,864	147,902			197,540	636,766	8,568,582	150,200	8,082,016	23,487,500		2007
40		2008							181,714	501,086	151,506			181,714	652,592	8,082,016	0	7,429,424			2008
41		2009							165,400	513,613	155,293			165,400	668,906	7,429,424		6,760,518			2009
42		2010							148,677	526,453	159,176			148,677	685,629	6,760,518		6,074,889			2010
43		2011							131,536	539,615	163,155			131,536	702,770	6,074,889		5,372,119			2011
44		2012							114,145	553,105	167,056			114,145	720,161	5,372,119	7,300	4,659,258	23,494,800		2012
45		2013							96,145	566,933	171,228			96,145	738,161	4,659,258	0	3,921,097			2013
46		2014							77,691	581,106	175,509			77,691	756,615	3,921,097		3,164,482			2014
47		2015							58,776	595,634	179,896			58,776	775,530	3,164,482		2,388,952			2015
48		2016							39,388	610,524	184,394			39,388	794,918	2,388,952		1,594,034			2016
49		2017							20,388	625,788	188,130			20,388	813,918	1,594,034	35,800	815,916	23,530,600		2017
50		2018							62	641,432	192,812			62	834,244	815,916	0	−18,328		−1,558,224	2018
TOTALS			51,349,373	7,714,236	0	0	2,423,719	2,423,719	17,759,654	18,551,386	4,900,378	0	41,211,418	17,759,654	23,451,764		23,530,599				

SOUTHWESTERN POWER ADMINISTRATION
AVERAGE RATE AND REPAYMENT STUDY
NARROWS DAM PROJECT

APPENDIX G

DECEMBER 1970
SUMMARY TABLE

(1) Year of Study		(2) Fiscal Year	(3) Gross Revenue $	(4) Corps O and M Expenses $	(5) SPA Operating Expenses Purchased Power $	(6) Service Charges $	(7) All Other $	(8) SPA Total $	(9) Corps and SPA Interest $	(10) Allocated For Depreciation and Repayment $	(11) Net Rev. From Operations $	(12) Downstream Benefits $	(13) Amount Avail. For Principal/Int. $	(14) Corps and SPA Interest $	(15) Principal $	(16) POWER INVESTMENT Beginning of Year $	(17) Added During Year $	(18) Balance To Be Repaid $	(19) Accumulated Annual Investment $	(20) Allowable Unpaid Balance $	Fiscal Year
		1950	3,823						–48		3,871	0	3,823	–48	3,871		5,496,130	5,492,259	5,496,130		1950
1		1951	166,266	122,751			10,283	10,283	136,891	90,370	–194,029		33,232	136,891	–103,659	5,492,259		5,595,918			1951
2		1952	233,382	128,467	34,366	4,872	36,817	76,055	139,537	90,370	–201,047		28,860	139,537	–110,677	5,595,918		5,706,595			1952
3		1953	310,364	115,524	106,096	12,000	48,394	166,490	142,311	88,532	–202,493		28,350	142,311	–113,961	5,706,595		5,820,556			1953
4		1954	321,535	109,616	117,564	12,000	13,317	142,881	144,651	89,624	–165,237		69,038	144,651	–75,613	5,820,556		5,896,169			1954
5	A	1955	331,621	114,409	128,586	12,000	19,751	160,337	146,693	89,766	–179,584		56,875	146,693	–89,818	5,896,169		5,985,987			1955
6		1956	331,439	92,648	129,819	12,000	4,868	146,687	148,498	91,704	–148,098		92,104	148,498	–56,394	5,985,987		6,042,381			1956
7	C	1957	333,219	91,393	129,095	12,000	8,648	149,743	149,909	91,691	–149,517		92,083	149,909	–57,826	6,042,381		6,100,207			1957
8		1958	358,328	104,494	125,866	12,000	9,302	147,168	151,172	91,354	–135,860		106,666	151,172	–44,506	6,100,207		6,144,713			1958
9	T	1959	364,451	126,673	128,686	12,000	5,963	146,649	152,479	90,369	–151,719		91,129	152,479	–61,350	6,144,713		6,206,063			1959
10	U	1960	363,584	112,024	127,856	12,000	6,101	145,957	153,832	90,369	–138,598		105,603	153,832	–48,229	6,206,063		6,254,292			1960
11		1961	365,692	141,078	42,132	3,367	45,695	91,194	154,689	90,369	–111,638		133,420	154,689	–21,269	6,254,292		6,275,561			1961
12	A	1962	331,731	126,444	32,000	4,532	17,414	53,946	154,997	90,369	–94,025		151,341	154,997	–3,656	6,275,561		6,279,217			1962
13		1963	309,040	127,869	0	0	18,516	18,516	154,820	90,894	–83,059		162,655	154,820	7,835	6,279,217	–1,030	6,270,352	5,495,100		1963
14	L	1964	300,000	134,156			16,464	16,464	154,681	89,393	–94,694		149,380	154,681	–5,301	6,270,352		6,275,653			1964
15	S	1965	300,112	134,043			14,560	14,560	154,204	81,362	–84,057		151,509	154,204	–2,695	6,275,653		6,278,348			1965
16		1966	300,000	135,659			10,987	10,987	154,367	–504,503	503,490		153,354	154,367	–1,013	6,278,348		6,279,361			1966
17		1967	300,000	129,208			19,705	19,705	155,232	–389,486	385,341		151,087	155,232	–4,145	6,279,361		6,283,506			1967
18		1968	300,000	133,855			16,163	16,163	155,250	33,045	–38,313		149,982	155,250	–5,268	6,283,506		6,288,774			1968
19		1969	300,000	155,835			14,461	14,461	155,622	33,871	–59,789		129,704	155,622	–25,918	6,288,774		6,314,692			1969
20		1970	345,328	164,978			16,790	16,790	190,141	40,577	–67,158		163,560	190,141	–26,581	6,314,692	1,666,926	8,008,199	7,162,026		1970
SUB-TOTAL			6,269,915	2,501,124	1,102,066	108,771	354,199	1,565,036	3,049,928	560,040	–1,406,213		2,203,755	3,049,928	–846,173		7,162,026				
21		1971	368,000	151,000			19,132	19,132	198,803	86,871	–87,806		197,868	198,803	–935	8,008,200	238,000	8,247,135	7,400,000		1971
22		1972	465,000				20,924	20,924	199,927	89,043	4,106		293,076	199,927	93,149	8,247,135	0	8,153,986			1972
23		1973					19,105	19,105	197,204	91,269	6,422		294,895	197,204	97,691	8,153,986		8,056,295			1973
24		1974					17,414	17,414	194,355	93,551	8,680		296,586	194,355	102,231	8,056,295		7,954,064			1974
25		1975					16,685	16,685	191,924	95,889	9,502		297,315	191,924	105,391	7,954,064	13,100	7,861,773	7,413,100		1975
26		1976					16,649	16,649	189,296	98,287	9,768		297,351	189,296	108,055	7,861,773	0	7,753,718			1976
27		1977					16,085	16,085	186,581	100,744	10,590		297,915	186,581	111,334	7,753,718		7,642,384			1977
28		1978					16,055	16,055	183,798	103,262	10,885		297,945	183,798	114,147	7,642,384		7,528,237			1978
29		1979					14,941	14,941	180,916	105,844	12,299		299,059	180,916	118,143	7,528,237		7,410,094			1979
30		1980					14,915	14,915	178,179	108,490	12,416		299,085	178,179	120,906	7,410,094	8,900	7,298,088	7,422,000		1980
31		1981					14,892	14,892	175,161	111,202	12,745		299,108	175,161	123,947	7,298,088	0	7,174,141			1981
32		1982							172,063	113,982	13,063			172,063	127,045	7,174,141		7,047,096			1982
33		1983							168,886	116,832	13,390			168,886	130,222	7,047,096		6,916,874			1983
34		1984							165,631	119,753	13,724			165,631	133,477	6,916,874		6,783,397			1984
35		1985							167,644	122,747	8,717			167,644	131,464	6,783,397	219,500	6,871,433	7,641,500		1985
36		1986					14,864	14,864	166,586	125,815	6,735		299,136	166,586	132,550	6,871,433	0	6,738,883			1986
37		1987							161,181	128,961	8,994			161,181	137,955	6,738,883		6,600,928			1987
38		1988							157,732	132,185	9,219			157,732	141,404	6,600,928		6,459,524			1988
39		1989							154,197	135,489	9,450			154,197	144,939	6,459,524		6,314,585			1989
40		1990							153,277	138,876	6,983			153,277	145,859	6,314,585	110,900	6,279,626	7,752,400		1990
41		1991							149,700	142,348	7,088			149,700	149,436	6,279,626	0	6,130,190			1991
42		1992							145,964	145,907	7,265			145,964	153,172	6,130,190		5,977,018			1992
43		1993							142,134	149,555	7,447			142,134	157,002	5,977,018		5,820,016			1993
44		1994							138,209	153,294	7,633			138,209	160,927	5,820,016		5,659,089			1994
45		1995							134,525	157,126	7,485			134,525	164,611	5,659,089	13,900	5,508,378	7,766,300	7,413,100	1995
46		1996							130,418	161,054	7,664			130,418	168,718	5,508,378	0	5,339,660			1996
47		1997							126,201	165,080	7,855			126,201	172,935	5,339,660		5,166,725			1997
48		1998							121,877	169,207	8,052			121,877	177,259	5,166,725		4,989,466			1998
49		1999							117,446	173,438	8,252			117,446	181,690	4,989,466		4,807,776			1999
50		2000							115,621	177,774	5,741			115,621	183,515	4,807,776	111,500	4,735,761	7,877,800		2000
51		2001							111,103	182,218	5,815			111,103	188,033	4,735,761	0	4,547,728			2001
52		2002							106,402	186,773	5,961			106,402	192,734	4,547,728		4,354,994			2002
53		2003							101,584	191,443	6,109			101,584	197,552	4,354,994		4,157,442			2003
54		2004							96,645	196,229	6,262			96,645	202,491	4,157,442		3,954,951			2004
55		2005							92,736	201,135	5,265			92,736	206,400	3,954,951	47,300	3,795,851	7,925,100		2005
56		2006							87,605	206,163	5,368			87,605	211,531	3,795,851	0	3,584,320			2006
57		2007							82,317	211,317	5,502			82,317	216,819	3,584,320		3,367,501			2007
58		2008							76,897	216,600	5,639			76,897	222,239	3,367,501		3,145,262			2008
59		2009							71,341	222,015	5,780			71,341	227,795	3,145,262		2,917,467			2009
60		2010							68,276	227,565	3,295			68,276	230,860	2,917,467	107,900	2,794,507	8,033,000		2010
61		2011							62,572	233,254	3,310			62,572	236,564	2,794,507	0	2,557,943			2011
62		2012							56,658	239,086	3,392			56,658	242,478	2,557,943		2,315,465			2012
63		2013							50,596	72,870	175,670			50,596	248,540	2,315,465		2,066,925			2013
64		2014							44,382	74,692	180,062			44,382	254,754	2,066,925		1,812,171			2014
65		2015							38,050	76,559	184,527			38,050	261,086	1,812,171	1,500	1,552,585	8,034,500		2015
66		2016							31,524	78,473	189,139			31,524	267,612	1,552,585	0	1,284,973			2016
67		2017							24,833	80,435	193,868			24,833	274,303	1,284,973		1,010,670			2017
68		2018							17,976	82,446	198,714			17,976	281,160	1,010,670		729,510			2018
69		2019							10,947	84,507	203,682			10,947	288,189	729,510		441,321			2019
70		2020							4,030	86,620	208,486			4,030	295,106	441,321	11,800	158,015	8,046,300		2020
71		2021							–3,341	88,785	213,692			–3,341	302,477	158,015	0	–144,462		7,175,100	2021
TOTALS			29,542,587	10,037,146	1,102,066	108,771	1,118,878	2,329,715	8,958,356	7,572,523	644,847	0	17,175,726	8,958,356	8,217,370		6,379,400				